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JEOPARDY AND MISTRIALS

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TABLE OF CONTENTS

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The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." For the defendant who declines to plead guilty and exercises the right to stand trial, the double jeopardy provision thus promises that the ordeal will not have to be repeated, or more accurately, that it *may* not have to be repeated, for a defendant may indeed be subject to reprosecution when any of a number of exceptions is found applicable.

Of these exceptions, one of the most important, and most troublesome, is the rule that a trial may be terminated prior to verdict and the defendant subjected to retrial if, in the durable language of *United States v. Perez*, the mistrial was prompted by "manifest necessity."[1] In the more than 150 years since formulation of the *Perez* test, the course of adjudication has provided little clarification of its meaning. Not long ago, the Supreme Court began a process of narrowing the situations in which a defendant could be retried after mistrial.[2] More recently, however, *Illinois v. Somerville*[3] apparently reversed this trend and signaled a return to the uncertainties of the general "manifest necessity" formulation. As a result, limitations upon reprosecution generally have been relaxed; at the same time, mistrials once again have become a potentially dangerous trap for the prosecution, with defendants on occasion winning immunity from punishment because a trial judge is held to have improperly applied the amorphous standard. Unsatisfactory as this situation is, the complexity of the competing interests and the infinite variety of circumstances in which they arise have continued to impede formulation of a standard whose application can be at once satisfying and predictable.

In this Article, I examine the sources of difficulty underlying the *Perez* test. I then suggest an approach through which some of these difficulties can be avoided and the propriety of retrial more meaningfully assessed. Some familiarity with the doctrinal maze that is double jeopardy law generally seems requisite to appreciating the more specific subtleties of "manifest necessity," so part I of the Article provides a preliminary *tour d'horizon*. Part II reviews the evolution of the "manifest necessity"

[1] 22 U.S. (9 Wheat.) 579, 580 (1824).

[2] *See* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

[3] 410 U.S. 458 (1973).

test from its beginnings in *Perez* through the recent struggles of lower courts applying the *Somerville* version of it. Finally, part III examines the interests affected by mistrial in situations that have proved persistently troublesome and on this basis suggests a framework for the resolution of mistrial problems.

The proposal builds upon my conclusion that the relatively flexible approach implicit in *Somerville* provides the appropriate standard for assessing the constitutionality of retrial in a wide range of situations. I seek to identify these situations by using guidelines keyed to the stage of trial at which the mistrial problem arises, and then specify the content of the flexible standard of "sound judicial administration" that should be applied in these situations. This flexible standard, however, will not adequately protect against the dangers of reprosecution in certain other situations. I therefore offer guidelines for identifying these other situations and specify the elements of the more restrictive "strict necessity" standard that should be applied when the propriety of retrial in these situations must be determined.

My proposal will not provide an automatic answer to every mistrial question that may arise. But it should permit resolution of these questions with considerably greater predictability, with due recognition for society's interest in an adequate opportunity to convict the guilty, and, above all, with assurance that the erosion of protection for the accused begun in *Somerville* will not proceed into areas in which stringent double jeopardy safeguards remain necessary.

I. DOUBLE JEOPARDY IN A NUTSHELL

The principle that a defendant may not be tried twice for the same offense has been described, probably without exaggeration, as "one of the oldest ideas found in western civilization,"[4] with roots traceable to early Greek, Roman, and canon law.[5] Blackstone recognized it as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence."[6] The protection originally afforded by this "universal maxim," however, was nar-

[4] Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

[5] *Id.* at 151-55 (Black, J., dissenting); United States v. Jenkins, 490 F.2d 868, 870-71 (2d Cir. 1973) (Friendly, J.), *aff'd*, 420 U.S. 358 (1975). The double jeopardy principle remained a creature of the peculiarities of judicial procedure in these legal systems, and it does not appear to have assumed anything resembling its modern form until about the fifteenth century. *See* J. SIGLER, DOUBLE JEOPARDY 1-16 (1969).

[6] 4 W. BLACKSTONE, COMMENTARIES *335.

rowly circumscribed. Neither conviction nor acquittal barred further proceedings if the verdict was rendered upon a faulty indictment or by a court technically lacking jurisdiction, because it was said that the defendant never had been in "jeopardy."[7] The common law pleas of former jeopardy were also unavailable when proceedings were terminated prior to judgment, because jeopardy was not deemed to "attach" until the verdict was rendered and duly recorded.[8] And the maxim applied only when the defendant's *life* was in jeopardy; multiple prosecution for noncapital felonies or misdemeanors was not restricted.[9]

American jurisdictions began to expand the scope of the common law doctrine as early as the colonial period.[10] Double jeopardy protection in the Colonies nevertheless remained narrow and technical, its application deeply dependent on the formalities of criminal pleading. When the framers of the fifth amendment incorporated the "universal maxim" into the Bill of Rights, their debates provided little indication of the intended scope of double jeopardy protection.[11] Consequently, the courts

[7] The leading decision concerning faulty indictments was Vaux's Case, 76 Eng. Rep. 992 (K.B. 1591). *See generally* M. FRIEDLAND, DOUBLE JEOPARDY 74-75 (1969). For a thorough treatment of the jurisdiction requirement, see *id.* 77-86.

[8] *See* 4 W. BLACKSTONE, COMMENTARIES *335-38. The defendant's protection was limited further by the fact that the judge, before recording a verdict, could ask the jury to reconsider it. As long as only one verdict was recorded, a verdict of acquittal could thus be changed to one of conviction without imposing double jeopardy. *See* J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES § 598 (36th ed. 1966). Blackstone notes that a jury could not be discharged prior to verdict "unless in cases of evident necessity," 4 W. BLACKSTONE, COMMENTARIES *360, but the defendant could not prevail on a plea of former jeopardy after an improper discharge of the jury by the trial judge. Winsor v. The Queen, L.R. 1 Q.B. 289 (1866); *see* M. FRIEDLAND, *supra* note 7, at 21-25.

[9] *See* 4 W. BLACKSTONE, COMMENTARIES *335-36. In England, double jeopardy protection now extends to noncapital cases, but the old limitations upon double jeopardy protection otherwise appear to have survived. The first judgment must be rendered by a court that has jurisdiction to try the offense. J. ARCHBOLD, *supra* note 8, at §§ 438, 451; C. HAMPTON, CRIMINAL PROCEDURE AND EVIDENCE 157 (1973). *But see* M. FRIEDLAND, *supra* note 7, at 77-80. Similarly, the rule that conviction or acquittal upon a faulty indictment affords no protection apparently remains good law, J. ARCHBOLD, *supra* note 8, at § 442, as does the rule that precludes remedies for improper discharge of the jury before verdict, Regina v. Elia, [1968] 2 All E.R. 587 (C.A.); J. ARCHBOLD, *supra* note 8, at § 605; *see* M. FRIEDLAND, *supra* note 7, at 21-25.

[10] The doctrine was extended, for example, to all offenses, capital or otherwise, by the Massachusetts Body of Liberties of 1641. J. SIGLER, *supra* note 5, at 21-22. *See generally* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 129-30, 198-99 (1960). As recently as 1964, however, the Pennsylvania Supreme Court held Pennsylvania's constitutional prohibition against putting any person "twice in jeopardy of life or limb" inapplicable in a prosecution for the noncapital offense of second-degree murder. Commonwealth v. Baker, 413 Pa. 105, 196 A.2d 382 (1964).

[11] *See* Green v. United States, 355 U.S. 184, 201-02 (1957) (Frankfurter, J., dissenting); J. SIGLER, *supra* note 5, at 27-34.

have been left to interpret the double jeopardy clause in light of their own understanding of its underlying purposes.[12]

This process of judicial interpretation has resulted in a considerable expansion of double jeopardy protection. For example, despite the "life or limb" language of the fifth amendment, double jeopardy protection extends to all crimes, capital or otherwise.[13] Moreover, protection begins not when the verdict is rendered, but as soon as the jury is sworn or, in a nonjury trial, when the judge begins to hear evidence.[14] As a result, the double jeopardy clause now serves a variety of important functions. Reflecting notions of res judicata, the clause ensures the finality of a judgment of acquittal and protects against multiple punishments for the same offense. But the clause also provides protections unrelated to res judicata; once jeopardy "attaches" at the beginning of the trial, reprosecution may be barred even though no adjudication results from the first proceeding. The doctrine thus provides more meaningful protection against the danger of governmental harassment and the burden of repeated trials than was afforded by the requirement of a final verdict.

Despite this expansion, the guarantees of the double jeopardy clause, as currently interpreted by American courts, are by no means absolute. Remnants of early restrictions on the principle remain, and a host of competing interests has prompted the creation of new limitations. Among the most important of these limitations—and the subject of this Article—is the *Perez* rule permitting reprosecution after a mistrial declared prior to verdict for reasons of "manifest necessity." This rule will be better understood, however, after a brief survey of the various possibilities for retrial that remain even after a final judgment.

A final judgment of acquittal supposedly operates as a definitive discharge with respect to the accusations at issue. The word "acquittal," however, is a special term of art. A jury verdict of not guilty always operates to discharge the defendant,[15] as does any judgment, no matter how improper, that purports to be an "acquittal" and is entered by the judge during

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[12] *See, e.g.*, Green v. United States, 355 U.S. 184 (1957) (Black, J.).

[13] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *cf.* Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy principles held to bar adult prosecution after a juvenile court prosecution on the same charge).

[14] Downum v. United States, 372 U.S. 734 (1963); Newman v. United States, 410 F.2d 259 (D.C. Cir. 1969). *Compare* Serfass v. United States, 420 U.S. 377 (1975), *with* United States v. Jenkins, 420 U.S. 358 (1975).

[15] United States v. Ball, 163 U.S. 662 (1896).

the trial and before verdict. In these situations, the government may not appeal, and reprosecution is not permissible.[16] On the other hand, if the judge sets aside a jury verdict of guilty and dismisses the charges, the ruling is appealable on the theory that a reversal will not require a retrial, because a judgment of conviction may be entered on the jury's original verdict.[17] A trial judge's decision dismissing charges may also be appealed if the ruling, whether or not entered after an evidentiary hearing, occurred before the beginning of the trial on the merits.[18] Although a successful government appeal will expose the defendant to new proceedings, the theory is that there is no *re*prosecution because jeopardy had yet to attach in the first trial.

Even the required kind of "acquittal," however, does not wholly guarantee the defendant's freedom from further prosecution. The first verdict will not bar further prosecution if the verdict was rendered by a court that lacked jurisdiction.[19] Acquittal by a state court will not provide immunity against federal prosecution on the same charges,[20] and, perhaps more surprisingly, the reverse is also true.[21] Moreover, an acquittal will bar subsequent prosecution only for the *same* offense.[22] This rule is a source of continuing controversy, and forceful arguments have been made that an "offense" for this purpose

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[16] *See* Fong Foo v. United States, 369 U.S. 141 (1962).

[17] United States v. Wilson, 420 U.S. 332 (1975). Similarly, a court of appeals' decision remanding the case for entry of a judgment of acquittal does not definitively discharge the defendant; the decision may be reversed on either a petition for rehearing or a petition for certiorari to the Supreme Court. Forman v. United States, 361 U.S. 416 (1960).

[18] Serfass v. United States, 420 U.S. 377 (1975).

[19] Woodring v. United States, 337 F.2d 235 (9th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965); State v. Price, 15 N.C. App. 599, 190 S.E.2d 403, *appeal dismissed*, 281 N.C. 762, 191 S.E.2d 364 (1972). Jurisdictional defects, however, will not defeat the double jeopardy claim if they are deemed to render the judgment "voidable" rather than "void." State *ex rel.* Johnson v. Thomson, 76 N.D. 125, 34 N.W.2d 80 (1948); *see* United States v. Sabella, 272 F.2d 206 (2d Cir. 1959).

[20] *See* United States v. Barnhart, 22 F. 285 (C.C.D. Ore. 1884); United States v. Sutton, 245 F. Supp. 357 (D. Md. 1965), *aff'd*, 363 F.2d 845 (4th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967).

[21] Bartkus v. Illinois, 359 U.S. 121 (1959). For suggestions that the rationale of *Bartkus* may have been vitiated by recent decisions, see Schaefer, *Unresolved Issues in the Law of Double Jeopardy:* Waller *and* Ashe, 58 CAL. L. REV. 391, 401-02 (1970). *See also* Waller v. Florida, 397 U.S. 387 (1970), holding that a state's division of jurisdiction between state and local courts does not permit retrial in one system after trial in the other system.

For a discussion of the Justice Department's policy concerning federal prosecution following state prosecution on the same charges, see note 26 *infra*.

[22] *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.418[2] (2d ed. 1974).

should include all crimes arising out of the same transaction or event.[23] The prevailing view, however, has been that prosecutors need the flexibility to present technically different charges in different trials. As a result, two offenses are not considered the same for double jeopardy purposes unless they involve precisely the same elements, or, as some courts put it, unless precisely the same evidence will suffice to prove both.[24]

Similar possibilities for further proceedings await a defendant found guilty at the initial trial. In principle, conviction and sentencing should bar additional punishment for the same offense.[25] But here again the "two sovereigns" concept comes into play, permitting separate state and federal prosecutions for the same crime.[26] Because the relevant "offense" is again narrowly defined, cumulative punishment is permissible for each technically separate crime committed in a single escapade.[27] Furthermore, if the defendant succeeds in upsetting his or her conviction on appeal, retrial is permitted under *United States v. Ball*.[28] Judicial efforts to account for the *Ball* doctrine in terms

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[23] *See* Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring).

[24] Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932). Indeed, the Court has allowed prosecutions for two offenses, even when the evidentiary facts necessary to prove each are precisely the same, if statutory presumptions permit different ultimate facts to be found from each. Harris v. United States, 359 U.S. 19 (1959). Acquittal on one charge will foreclose prosecution for a different offense if that offense requires proof of a fact necessarily resolved in the defendant's favor in the first case, Ashe v. Swenson, 397 U.S. 436 (1970), but the issues in a criminal case are rarely sufficiently simple to permit invocation of this principle after a general verdict of acquittal.

[25] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[26] Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); *see* note 21 *supra* & accompanying text.

Current United States Department of Justice policy forbids federal prosecution following state prosecution on the same charges, except upon the explicit approval of the appropriate Assistant Attorney General. *See* Petite v. United States, 361 U.S. 529, 530-31 (1960). *See also* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROB. 65, 73 (1948). In several recent cases, however, the Justice Department has violated this policy. When the error is acknowledged at higher eschelons of the Department, the defendant may belatedly obtain dismissal of the federal charges, *see, e.g.*, Watts v. United States, 422 U.S. 1032 (1975), but if the Department's change of position comes too late, the court may refuse to dismiss the charges even upon the joint motion of the prosecution and defense, *see, e.g., In re* Washington, 531 F.2d 1297 (5th Cir. 1976).

[27] Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932).

[28] 163 U.S. 662, 671-72 (1896). This result differs from the common law rule prohibiting retrial after reversal of a conviction, a rule that survives in English law to this day. Criminal Appeal Act, 1968, c. 19, § 2(2)-(3); *see* M. FRIEDLAND, *supra* note 7, at 221-28. The force of this stringent rule has been mitigated only by the very limited qualification that the quashed conviction will not be given the collateral estoppel effect

of "waiver" of the defendant's immunity from retrial or in terms of a single "continuing jeopardy" generally are conceded to be conceptually sterile, and the only real justification for the doctrine is the practical importance of preventing every trial defect from conferring immunity upon the accused.[29] Nevertheless, the *Ball* doctrine does substantially reduce the protection against successive prosecutions by permitting a second trial following governmental error or misconduct in the first, provided that the first trial had ended in a conviction. And the doctrine has been extended to permit retrial when the underlying error is the trial judge's failure to direct a verdict of acquittal, an action that would have barred government appeal or reprosecution if properly taken.[30]

Double jeopardy doctrine thus remains riddled with loopholes of varying conceptual coherence and uneven pragmatic justification. But as imperfect as the defendant's protection is in cases of "acquittal" or "conviction," double jeopardy protection is subject to even greater erosion in the absence of meaningful restrictions upon the government's power to terminate a trial before judgment and begin anew. The next section focuses upon the content of these important restrictions.

II. Retrial After Mistrial: The "Manifest Necessity" Doctrine

Once jeopardy has attached in a criminal trial, circumstances often will suggest that the proceedings should be terminated prior to a formal verdict of guilt or acquittal. In such situations, the judge need not, at least in theory, decide whether a subsequent trial on the same charges would be permissible; the only question before the court is whether the first trial should be discontinued. Nevertheless, the judge's obligation to select

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of a full-fledged acquittal. Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, 48 Crim. App. 183.

[29] United States v. Tateo, 377 U.S. 463, 466 (1964). *See also* Breed v. Jones, 421 U.S. 519, 534-35 (1975).

[30] Bryan v. United States, 338 U.S. 552 (1950). If, however, the defendant moves *only* for a judgment of acquittal and does not file an alternative motion for a new trial, then reprosecution is impermissible. United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971); *see* Sapir v. United States, 348 U.S. 373 (1955) (Douglas, J., concurring); United States v. Bass, 490 F.2d 846 (5th Cir. 1974). To this extent, the discredited "waiver" concept still plays a significant role in determining the scope of the *Ball* doctrine.

If the defendant is convicted upon retrial, the imposition of a sentence more severe than that imposed after the original conviction does not violate the double jeopardy clause, although such an increased sentence may, under some circumstances, constitute a denial of due process. North Carolina v. Pearce, 395 U.S. 711 (1969).

among different forms of termination orders has meant that in practice both questions are resolved, at least in the first instance, at the initial trial.

If the trial judge suspends the proceedings and either dismisses the indictment with prejudice, directs a verdict of acquittal, or enters a judgment of acquittal in a bench trial, the ruling operates to foreclose subsequent prosecution on the charges involved because appellate review of these rulings is barred by the double jeopardy clause.[31] If instead, the trial judge terminates the proceedings by declaring a mistrial, the order is taken to reflect a judgment that retrial on the same charges should be permitted. Although a double jeopardy claim will not arise until subsequent proceedings actually begin,[32] the claim nonetheless constitutes an attack on the propriety of the original mistrial declaration. This section examines judicial efforts to develop standards for resolving this kind of claim in cases in which the defendant opposed the mistrial declaration from the outset or was afforded no opportunity to question it. The possibilities for asserting a double jeopardy claim when the defense has affirmatively sought the mistrial order, and thus arguably waived its protection against retrial, will be considered after the scope of this protection has been delineated.[33]

A. Perez *and the Early Cases*

The Supreme Court first considered the permissibility of reprosecution after mistrial in 1824 in *United States v. Perez*.[34] The defendant had been tried on a capital charge. When the jurors were unable to agree, they were discharged, and the defendant was held for retrial. The Court ruled that discharge of the "hung" jury did not bar further proceedings:

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[31] *See* text accompanying notes 15-18 *supra*.

[32] Normally the double jeopardy claim must be raised by the defendant prior to retrial. *See, e.g.*, FED. R. CRIM. P. 12(b). If the claim is denied by the trial judge, the defendant may have to await conviction in the second trial before obtaining appellate review of the validity of the proceedings. A growing body of cases, however, recognizes that such relief is insufficient, and permits appellate review of the double jeopardy issue before trial, either by interlocutory appeal, *see, e.g.*, United States v. Barket, 530 F.2d 181 (8th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3322 (U.S. Nov. 2, 1976); United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), or by writ of habeas corpus, *see, e.g.*, United States *ex rel.* Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975); United States *ex rel.* Russo v. Superior Court, 483 F.2d 7 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973).

[33] *See* text accompanying notes 309-33 *infra*.

[34] 22 U.S. (9 Wheat.) 579 (1824).

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.[35]

The language of "manifest necessity" and the warning that the power to declare mistrials "ought to be used with the greatest caution, under urgent circumstances" suggested that mistrial decisions might be subjected to the closest scrutiny. But Supreme Court decisions soon dispelled this view. In subsequent cases, the language of "caution" and "necessity" drew far less attention than *Perez*'s repeated references to "discretion," and *Perez* usually was cited as a case narrowly limiting the power of appellate courts to question a trial judge's mistrial order. In fact, until the 1960's no Supreme Court decision ever held the grant of a mistrial to be improper under *Perez*.[36]

This result in part reflected the Court's general reluctance to impose specific rules of procedure in state criminal cases. Because the double jeopardy clause of the fifth amendment had been held inapplicable to the states,[37] retrial following mistrial in

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[35] *Id.* at 580.

[36] For cases upholding the grant of mistrial, see Wade v. Hunter, 336 U.S. 684 (1949) (military necessity); Lovato v. New Mexico, 242 U.S. 199 (1916) (defect in plea to the indictment); Keerl v. Montana, 213 U.S. 135 (1909) (hung jury); Dreyer v. Illinois, 187 U.S. 71 (1902) (hung jury); Thompson v. United States, 155 U.S. 271 (1894) (disqualification of juror); Logan v. United States, 144 U.S. 263 (1892) (hung jury); Simmons v. United States, 142 U.S. 148 (1891) (disqualification of juror). Many lower court decisions, however, did find mistrial declarations improper in certain circumstances. *See* notes 57-60 *infra* & accompanying text.

[37] Palko v. Connecticut, 302 U.S. 319 (1937).

a state court could be barred only under the less demanding strictures of fourteenth amendment due process.

This view led to Supreme Court approval of mistrials in situations very far from the urgent and necessary circumstances contemplated by *Perez*. Perhaps the most egregious of these decisions was *Brock v. North Carolina*.[38] There the state prosecutor had completed the bulk of his case when two of his corroborating witnesses refused to testify, claiming the privilege against self incrimination. The trial judge declared a mistrial so that, after pending charges against the two witnesses were resolved, the prosecutor could have the benefit of their testimony. The Supreme Court found no constitutional bar to retrial, stressing that "[j]ustice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury."[39]

This relatively permissive attitude toward retrials, however, was not confined to cases coming from the state courts. In *Gori v. United States*,[40] the federal trial judge had abruptly declared a mistrial during the government's direct examination of its fourth witness. Although the reasons for his action were never made entirely clear, the trial judge apparently believed that the prosecutor's line of questioning would eventually touch on other crimes committed by the defendant. The judge, in his desire to forestall prejudice to the accused, ordered the mistrial before the prosecutor had even asked an offending question, and before any objection had been raised by the defense.

The Supreme Court again concluded that retrial was not barred by the double jeopardy clause. Mr. Justice Frankfurter, writing for the majority, accepted the lower court's finding that the trial judge had displayed "overzealousness" and had acted "too hastily,"[41] but declined to examine the propriety of the mistrial ruling on its merits. The Court stressed that it was not able to render an independent judgment upon events occurring in the heat of trial, and although it quoted the "manifest necessity" language of *Perez*, the Court refused to "scrutinize with sharp surveillance the exercise of [a trial judge's] discretion."[42] The

[38] 344 U.S. 424 (1953).
[39] *Id.* at 427.
[40] 367 U.S. 364 (1961).
[41] *Id.* at 366.
[42] *Id.* at 368.

fact that the judge's action was "neither apparently justified nor clearly erroneous"[43] was therefore treated by the Court as sufficient reason not to overturn the mistrial order at least when it apparently had been entered solely out of solicitude for the defendant.

Mr. Justice Douglas, joined by three other members of the Court, dissented. For him, the starting point was not the *Perez* principle of discretion, but instead the *Perez* principle that once jeopardy attaches, a subsequent prosecution should be allowed only in the most exceptional circumstances. Arguing that the double jeopardy clause was "designed to help equalize the position of government and the individual,"[44] the Douglas dissent concluded that the risk of precipitous or improper action by the trial judge should rest on the government rather than on the defendant.

With *Gori*, the defendant's protection against reprosecution after mistrial had disintegrated almost to the vanishing point. The courts considered the proposition settled that a mistrial followed by retrial was the proper course in the event of a hung jury[45] or "a breakdown in judicial machinery."[46] The latter included not only military exigency,[47] but also illness of the defendant,[48] the judge,[49] or a juror,[50] and in some instances even illness in the family of the judge[51] or a juror.[52] The discovery of juror bias, whether in favor of the prosecution or the defense, likewise created a "necessity" for mistrial,[53] as did the existence of a procedural defect in the institution of the prosecution, albeit through the fault of the government.[54] To treat such difficulties as instances of "breakdown" involved considerable hyperbole because continuances, replacement of jurors, or vari-

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[43] *Id.* at 367.

[44] *Id.* at 372 (Douglas, J., dissenting).

[45] *See, e.g.*, Gilmore v. United States, 264 F.2d 44 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959).

[46] Gori v. United States, 367 U.S. 364, 372 (1961) (Douglas, J., dissenting).

[47] *See, e.g.*, Wade v. Hunter, 336 U.S. 684 (1949).

[48] *See, e.g.*, United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956).

[49] *See, e.g.*, Freeman v. United States, 237 F. 815 (2d Cir. 1916).

[50] *See, e.g.*, United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941).

[51] *See, e.g.*, Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910).

[52] *See, e.g.*, Stocks v. State, 91 Ga. 831, 18 S.E. 847 (1893).

[53] *See, e.g.*, United States v. Cimino, 224 F.2d 274 (2d Cir. 1955); United States v. McCunn, 36 F.2d 52 (S.D.N.Y. 1929).

[54] *See, e.g.*, Simpson v. United States, 229 F. 940 (9th Cir.), *cert. denied*, 241 U.S. 668 (1916).

ous other techniques short of mistrial were often available to cure them. Nevertheless, the abundant decisions were virtually unanimous in holding that retrial in such situations did not subject the defendant to double jeopardy.[55]

The defendant's position was not very much better when difficulties not involving structural "breakdown" arose. Reviewing courts generally regarded problems of trial practice, such as the handling of witnesses and their testimony, as matters peculiarly within the discretion of the trial judge. *Gori* made it virtually impossible to challenge this discretion if the mistrial decision appeared to benefit the defendant, and even if the mistrial clearly benefited the prosecution, the reviewing court often deferred to the trial judge. Indeed, courts frequently upheld mistrials prompted solely by the absence of prosecution witnesses.[56]

This approach toward mistrials greatly restricted a defendant's ability to invoke the double jeopardy clause successfully after a mistrial declaration. Although the defendant presumably could prevail by establishing deliberate harassment by the prosecution or an effort by the trial judge to help the government because its case had been going badly,[57] such situations, whatever their frequency, seldom were proved in court. A double jeopardy claim also might prevail if a mistrial resulted from unpreparedness on the part of the prosecution, although the case law was split on this issue.[58] Finally, a mistrial based on a structural defect could be attacked by showing that, in fact, no such defect existed. This possibility, however, often produced rather anomalous results. For example, an apparent defect in an indictment would justify subjecting the defendant to mistrial and reprosecution provided that the government truly had bungled its job.[59] But an appellate ruling that the indictment had been properly drawn would render the mistrial ruling erroneous and immunize the defendant from reprosecution.[60]

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[55] *See* AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW 79-87 (1935); Annot., 6 L. Ed. 2d 1510 (1961).

[56] *See, e.g.*, United States v. Coolidge, 25 F. Cas. 622 (C.C.D. Mass. 1815) (No. 14,858) (Story, J.); State v. Collins, 115 N.C. 716, 20 S.E. 452 (1894).

[57] Gori v. United States, 367 U.S. 364, 369 (1961) (dictum).

[58] *Compare* Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), *with* cases cited note 56 *supra*.

[59] *See, e.g.*, Simpson v. United States, 229 F. 940 (9th Cir.), *cert. denied*, 241 U.S. 668 (1916).

[60] *See, e.g.*, Loyd v. State, 6 Okla. Crim. 76, 116 P. 959 (1911); *cf.* People v. Laws, 29 Ill. 2d 221, 193 N.E.2d 806 (1963) (trial judge erroneously thought failure to take the defendant's plea was a fatal defect); Gillespie v. State, 168 Ind. 298, 80 N.E. 829

These early cases thus evidenced a relatively technical approach to double jeopardy claims. Little attention was focused on the underlying constitutional policy of protecting a defendant from deliberate harassment and the strain of repeated trials. This policy was viewed as far less important than the need for flexibility and deference to the decision rendered on the spot by the trial judge.

B. *The Modern Era:* Downum, Jorn, *and* Somerville

Less than two years after its decision in *Gori*, the Supreme Court radically transformed the jurisprudence of mistrials in *Downum v. United States*.[61] The case involved a prosecution on six counts of mail theft and forgery. After the jury was selected and sworn, but before testimony began, the prosecutor asked that the jury be discharged because his key witness for two of the counts was not present. This motion was granted over the defendant's objection, and two days later the case was called again, a second jury was impaneled, and the defendant was tried and convicted on all counts.

On these facts, the Court held that the defendant had been subjected to double jeopardy and reversed the convictions. Mr. Justice Douglas, writing for the majority,[62] recognized some discretion to discharge a jury before a verdict, but stressed, as he had in the *Gori* dissent, that this discretion should be exercised "only in very extraordinary and striking circumstances."[63] While refusing to hold that absence of witnesses could never justify a mistrial, the Court noted that in the case before it the witness' unavailability had been known before the jury was impaneled. The prosecutor therefore was responsible for the difficulty and took his chances by proceeding. In its closing passage, the Court made plain the guiding premise of its approach: "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.' "[64]

(1907) (trial judge erroneously found a juror to be related to one of the defendants).

[61] 372 U.S. 734 (1963).

[62] Mr. Justice Douglas wrote for a majority of five, consisting of the *Gori* dissenters and Mr. Justice Goldberg, who had replaced Mr. Justice Frankfurter on the Court.

[63] 372 U.S. at 736 (quoting United States v. Coolidge, 25 F. Cas. 622, 623 (C.C.D. Mass. 1815)).

[64] *Id.* at 738 (quoting United States *ex rel.* Rush v. Watson, 28 F. Cas. 499, 501 (S.D.N.Y. 1868)).

Mr. Justice Clark, writing for the four dissenters, noted both the apparent good faith and diligence of the prosecutor,[65] and the lack of any discernible prejudice to the defendant.[66] More importantly, he stressed that the trial judge handled the problem in a reasonable manner. While a mistrial might have been avoided by a continuance or by severance of the charges, the former approach could have disrupted the court's calendar and the latter might have seriously hampered presentation of the government's case. Under these circumstances, the dissenters regarded the mistrial solution as a valid exercise of discretion.

The Court easily might have reconciled the result in *Downum* with its earlier decision in *Gori*. The *Downum* mistrial, unlike the mistrial in *Gori*, certainly was not intended to help the accused. The general rule of deference to trial court decisions, moreover, often had been held inapplicable to mistrials ordered because of the absence of prosecution witnesses.[67] And in *Gori*, where the impact of testimony was at issue, the need for deference to the trial judge was far greater than in *Downum*, where assessment of the relevant facts required no familiarity with "the heated atmosphere of trial."[68]

The *Downum* Court, however, chose not to distinguish *Gori* on any of these grounds. Rather, it emphasized the policy of resolving all doubts in the defendant's favor to spare him the burden of successive prosecutions, and it sharply criticized the exercise of "arbitrary judicial discretion." This approach suggested that more searching review would become the rule in a broad range of mistrial situations. Moreover, the Court appeared unconcerned with the availability of possible alternatives to mistrial, such as severance or continuance.[69] Its failure to discuss this issue suggested that a variety of trial problems attributable to governmental error might be held insufficient to justify mistrial, even in the absence of any alternative solution.

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[65] *Id.* at 742 (Clark, J., dissenting).

[66] *Id.* at 743 (Clark, J., dissenting).

[67] *See* text accompanying note 58 *supra*.

[68] Gori v. United States, 367 U.S. 364, 366 (1961) (quoting the lower court opinion, 282 F.2d 43, 47 (2d Cir. 1960)). *See also* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1278-79 (1964).

[69] The Court mentioned that the missing witness was essential for only two of the counts and that the prosecution might have proceeded on the remaining four. 372 U.S. at 737. Yet the Court barred retrial even for the two counts on which it had been impossible to proceed. Moreover, the Court nowhere suggested that its view was dependent on the feasibility of a continuance, a solution that the dissenters regarded as impracticable under the circumstances. *Id.* at 742 (Clark, J., dissenting).

In *United States v. Jorn*,[70] the Court reaffirmed *Downum* and perhaps even extended it. Jorn was prosecuted for willfully assisting in the preparation of fraudulent tax returns. After the jury was sworn, the government called as a witness one of the taxpayers whom the defendant had allegedly aided. The trial judge believed that this witness, and several others similarly situated, had not been adequately informed of their constitutional rights. Without considering alternative remedies, he dismissed the jury and declared a mistrial in order to give the witnesses time to retain their own attorneys and to consult with them. Prior to the second trial, the same judge upheld the defendant's plea of former jeopardy, and the Supreme Court affirmed.

Speaking for a plurality of four,[71] Mr. Justice Harlan quoted the relevant *Perez* language in full but found in it the "theme of a 'manifest necessity' standard of appellate review."[72] *Gori* was treated as representing a possible "variation" under which review might be less searching if the mistrial was declared for the defendant's benefit. But Mr. Justice Harlan sharply criticized the *Gori* opinion (in which he had joined) and explicitly rejected any limitation on review based upon the intended beneficiary of the mistrial, stressing that the double jeopardy clause protects the defendant from the strain and insecurity of retrial even when oppressive government tactics are absent. Accordingly, the plurality held that "independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury."[73] A trial judge abuses his or her discretion by ordering a mistrial without a "scrupulous" search for alternative means to deal with difficulties, whether or not attributable to the government. Because the trial judge had made no effort to explore the possibility of a continuance to permit the witnesses to consult with counsel, he had not exercised the "sound discretion" required by *Perez*.

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[70] 400 U.S. 470 (1971).

[71] Justices Black and Brennan took the view that the Supreme Court lacked jurisdiction over the government's appeal because the trial judge's action operated as an "acquittal" of Jorn. Because the majority reached the merits, they joined in the judgment of affirmance but not in the plurality opinion. *Id.* at 488 (Black & Brennan, JJ., concurring). *See generally* text accompanying notes 15-18 *supra* on the question of appeal by the prosecution.

[72] 400 U.S. at 482.

[73] *Id.*

Mr. Justice Stewart, writing for the three dissenters, found the plurality opinion "flatly inconsistent" with *Gori*.[74] Because there was no indication of intent to harass and no suggestion of prejudice to the defendant, he would have allowed reprosecution.

Because the two concurring Justices appeared to entertain an even stricter conception of double jeopardy requirements than did the plurality,[75] a few courts made the hazardous assumption that Mr. Justice Harlan's opinion in effect reflected the governing rule.[76] If it did, *Jorn* further tightened the limitations on retrial after mistrial. Both *Downum* and *Jorn* upheld double jeopardy claims in the absence of actual or potential harassment and in the absence of identifiable prejudice to the defendant.[77] But *Downum* involved a particularly unpardonable fault of the prosecutor—unpreparedness. *Jorn*, on the other hand, concerned a trial problem for which only the judge was even arguably at fault and stated that whatever the source of the particular problem, the trial judge faces the same obligation to search diligently for alternative solutions before declaring a mistrial. Presumably, therefore, problems beyond the control of any of the parties, such as illness or other "acts of God," also would trigger this obligation. *Jorn* thus appeared to lay to rest the old notion of deference to the trial judge and to replace it with appellate review based on a test that offered some hope for meaningful analysis and predictable results by focusing on actual "necessity" in light of available alternatives.

Just two years after *Jorn*, the Court addressed the problem again, but in considerably different terms. The jury in *Illinois v. Somerville*[78] had been impaneled and sworn, but before any evi-

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[74] *Id.* at 491 (Stewart, J., dissenting).

[75] *See* note 71 *supra*. The appearance was, of course, deceptive because the position of Justices Black and Brennan on the question of government appeals would not compel a correspondingly strict attitude toward the distinct issue of the propriety of mistrial.

[76] *E.g.*, Clemensen v. Municipal Court, 18 Cal. App. 3d 492, 499, 96 Cal. Rptr. 126, 129-30 (1971); People v. Gardner, 37 Mich. App. 520, 525, 195 N.W.2d 62, 65 (1972). *Contra*, Baker v. State, 15 Md. App. 73, 289 A.2d 348 (1972), *cert. denied*, 410 U.S. 969 (1973). *See generally* Note, *Mistrial and Double Jeopardy*, 49 N.Y.U. L. REV. 937, 945-46 n.56 (1974). For consideration of the problematical status of plurality opinions generally, see Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

[77] There was, for example, no showing that the jury selected in the first trial was likely to be especially sympathetic to the defense, that testimony at the first trial was surprisingly favorable to the accused, or that evidence became unavailable to the defense prior to the second trial.

[78] 410 U.S. 458 (1973).

dence was taken the prosecutor realized that the indictment was fatally defective. Under Illinois law the defect could not be waived; any conviction therefore could have been overturned by the defendant on appeal or in a subsequent collateral proceeding. The trial court granted a mistrial so that the grand jury could hand down a properly drawn indictment, and the defendant was then tried and convicted on the second indictment.

Because in 1969 the double jeopardy clause had been held to be incorporated into the fourteenth amendment,[79] the validity of this state mistrial decision was governed by fifth amendment standards. Nevertheless, the Supreme Court, dividing five to four, rejected the defendant's double jeopardy claim. Mr. Justice Rehnquist's opinion for the Court drew from prior cases a general rule approving mistrials "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial."[80] *Downum* was distinguished as involving a difficulty that "len[t] itself to prosecutorial manipulation"[81] and *Jorn* as involving "erratic" action by the trial judge in a situation in which alternatives made mistrial unnecessary. In contrast, the Court found in *Somerville* no demonstrable prejudice to the defendant and no possibility of manipulation by the government. And in view of state procedures, which the *Somerville* Court declined to question, mistrial was seen as the only available remedy short of the wasteful process of delaying retrial until after completion of the first trial, conviction, and reversal.

Mr. Justice White, speaking for three of the dissenters, considered the case controlled by *Downum* and *Jorn*, which had up-

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[79] Benton v. Maryland, 395 U.S. 784 (1969).

[80] 410 U.S. at 464.

[81] *Id.* The Court also distinguished *Downum* as a case in which the mistrial "operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Id.* at 469. The passage is a perplexing one. In one stroke the Court passed up the opportunity to distinguish *Downum* as a case in which an alternative to mistrial (continuance) was readily available, lent its support to the view that mistrial would have been improper in *Downum* even in the absence of alternatives, *see* text accompanying note 69 *supra*, and plainly implied that in a case like *Downum* an order granting a short continuance—in lieu of mistrial—might itself violate the double jeopardy clause. Acceptance of the last of these propositions would represent a revolutionary extension of double jeopardy doctrine, because it has been considered settled that a trial judge may properly allow a midtrial continuance to enable the government to present additional witnesses or to prepare its rebuttal more fully, except when prosecutorial neglect is inexcusable and the continuance represents an unreasonable break in the continuity of the trial. *See* note 212 *infra* & accompanying text. It is difficult to believe that the Court in *Somerville* intended to upset this principle.

held double jeopardy claims in the absence of any specific prejudice to the defendant and in the absence of harassment or other governmental misconduct beyond mere oversight or mistake. State procedure made the mistrial "necessary" only because of the government's failure to frame a proper indictment, an error he found indistinguishable from the government's unpreparedness in *Downum*. In arguing that the defendant's interest in having his trial completed by the first tribunal should take precedence in this situation, Mr. Justice White implied that he agreed with the view, traceable to *Downum*, that mistrial should be improper whenever difficulties result from error on the part of the prosecution, even if no alternative means for curing the error are available. A separate dissent by Mr. Justice Marshall explicitly accepted this position[82] but relied primarily on the ostensibly narrower ground that alternatives were in fact available here—the trial judge could have held that the indictment *was* amendable under state law, a view that might have persuaded the state supreme court, or he could have proceeded with the trial, a course that might have ended the matter with an acquittal.[83] Beyond this, Mr. Justice Marshall called for a searching analysis of the importance of the state procedural rule at issue; he found the state interest in protecting the jurisdiction of the indicting grand jury far less substantial than the defendant's right to have his trial completed by the first trier of fact.

Somerville is, as the dissenting opinions indicate, exceedingly difficult to reconcile with the combined holdings of *Downum* and *Jorn*. Of the innumerable factors involved in each case, four seem particularly significant: (1) the source of the difficulty (prosecutorial error, act of God, and so on); (2) the associated motivation (intentional harassment, potential harassment, or evident good faith); (3) the indicated prejudice to the defendant associated with retrial (loss of a tactical advantage gained in the first trial or other harm apart from the fact of retrial itself); and (4) the available alternatives to mistrial. In terms of these factors, *Jorn* held both potential harassment and identifiable prejudice unnecessary to a double jeopardy claim, at least when error is attributable to the government and alternatives are available.

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[82] 410 U.S. at 483 n.2 (Marshall, J., dissenting).

[83] Another alternative, not mentioned by Mr. Justice Marshall, was to abort the trial but then to reimpanel the same jury to hear the case on the corrected indictment. *See* note 270 *infra*.

The defendant's claim in *Somerville* went beyond that in *Jorn*, because, at least arguably, a workable alternative to mistrial was not available. *Downum*, however, suggested that mistrial is improper, whether alternatives are available or not, as long as the error originates with the prosecution. In this sense, *Downum* and *Jorn* together required upholding the double jeopardy claim in *Somerville*.

One way of reconciling the three cases is suggested by the *Somerville* Court's treatment of *Downum* as a case in which the potential for prosecutorial manipulation existed. Although the *Downum* situation had not been so interpreted by the Court at the time, viewing it in this way leads to the following pattern of rules: mistrial is improper if a difficulty originates with the government and is subject to manipulation, even if no prejudice results and no alternatives are available (*Downum*); mistrial is also improper if a difficulty originates with the government and alternatives are available, even if no prejudice results and the difficulty is not subject to manipulation (*Jorn*); mistrial is proper, however, if a difficulty originates with the government but no prejudice is shown, the difficulty is not subject to manipulation, and no alternatives are available (*Somerville*). A double jeopardy claim may, in short, succeed in the absence of demonstrable prejudice, in the absence of available alternatives, or in the absence of a potential for manipulation, but not in the absence of all three.

This analysis may reconcile the principal cases; it may even suggest a plausible if somewhat mechanical means for reconciling the relevant competing interests. It does not, however, fully capture the implications of the *Somerville* opinion. Consider first the Court's treatment of the *Downum* facts. If the unavailability of the principal witness in *Downum* "would lend itself to prosecutorial manipulation,"[84] it is hard to see how the same is not equally true of the deficiency of the indictment in *Somerville*. In neither case was the difficulty likely to be injected deliberately so that the prosecution would have an escape hatch if its case should go badly. If anything, the difficulty in *Downum* was less susceptible to prosecutorial manipulation: a prosecutor might hope for conviction on a technically defective indictment,[85] but

[84] Illinois v. Somerville, 410 U.S. 458, 464 (1973).

[85] As early as United States v. Ball, 163 U.S. 662 (1896), the Court recognized that a defendant brought to trial upon a fatally defective indictment is from a practical standpoint very much in jeopardy, and that the legally insufficient conviction may nevertheless send him to prison. *Id.* at 667-68.

he or she scarcely could expect to convict without the witnesses essential to prove the case. As a result, the *Somerville* opinion may suggest that a significant possibility or even probability of actual harassment may be necessary to invoke whatever remains of the *Downum* rule.

The *Somerville* Court's treatment of *Jorn* poses similar problems. The description of the *Somerville* situation as one in which there was essentially no alternative to mistrial suggests that the *Jorn* requirement of a "scrupulous" search for alternatives survives intact. But other passages imply that the vice in *Jorn* was the rejection of alternatives "in the absence of some important countervailing interest."[86] Conceivably, an alternative need not be pursued if it would involve any significant inconvenience. Still other portions of the Rehnquist opinion can be read as dispensing with even this limited requirement, so long as the trial judge's performance is not regarded as "erratic."[87]

Most troubling, however, is the Court's statement that a mistrial is proper "if an impartial verdict cannot be reached or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error . . . ."[88] Taken literally, this passage requires upholding a mistrial order even if some other device could have cured the error—even if, for example, state procedure permitted the cure of defective indictments *either* by mistrial *or* by amendment. Given the Court's treatment of *Jorn*, it is unfortunately not easy to dismiss this reading of the passage as an unintended one.

Somerville, however, may not have limited double jeopardy protection as severely as these facets of the opinion suggest. *Somerville* reaffirmed the proposition that a trial judge's exercise of discretion should be "scrutinized,"[89] and specifically approved the important implication of *Jorn* that "lack of demonstrable additional prejudice [other than retrial itself will not] preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest . . . ."[90] In fact, the *Somerville* Court passed up the opportunity to dismiss the *Jorn* plurality opinion as representing the views of only four Justices and instead referred repeatedly to the Harlan analysis as that of

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[86] 410 U.S. at 471.
[87] *Id.* at 469.
[88] *Id.* at 464.
[89] *Id.* at 462-63.
[90] *Id.* at 471.

"the Court."[91] In this sense, *Somerville* actually strengthens the authority of *Jorn* and requires careful evaluation of the defendant's interest in having his or her case completed by the first tribunal.

Considerable caution is necessary, therefore, in tracing the extent to which *Somerville* has relaxed the barriers to reprosecution after mistrial. The case undoubtedly calls for a significant shift in emphasis in the analysis of mistrial decisions. The Court's reading of *Downum* and *Jorn* suggests that, in cases not involving demonstrable prejudice to the defendant, retrial will be permitted unless there is either a probability of harassment or a failure to consider readily available alternatives. Even when mistrial raises a specific problem for the defense, retrial conceivably might be permitted if the alternatives to mistrial involve serious inconvenience found to outweigh the potential for prejudice to the defendant. *Somerville* thus appears to discard the sharply focused analysis of alternatives required by *Jorn* in favor of an open-ended balancing of all the facts. And, more importantly, underlying this change in method may be a change in the conception of the double jeopardy clause itself, with its function in the mistrial context now seen almost exclusively as one of protecting the defendant from governmental harassment, and not, as so emphatically stated by the *Jorn* plurality, safeguarding the defendant from the strain and insecurity that result from retrials "independent of the threat of bad-faith conduct by judge or prosecutor."[92]

C. *The Remaining Questions*

The changing tides that have marked the jurisprudence of mistrials from *Perez* through *Somerville* will seem only too familiar to anyone acquainted with the Court's changing attitudes toward criminal procedure generally. The grant of wide discretion to trial judges and the willingness reflected in *Gori* to presume their conscientious protection of defendants' rights came naturally to a Court that had yet to decide *Mapp v. Ohio*[93] and *Gideon v. Wainwright*.[94] *Downum*'s stringent restrictions upon re-

[91] *Id.* at 469-70.

[92] United States v. Jorn, 400 U.S. 470, 485 (1971) (Harlan, J.).

[93] 367 U.S. 643 (1961).

[94] 372 U.S. 335 (1963). The permissive attitude toward mistrial reflected in *Gori* was striking in that it applied even within the federal system, while the rules extended to the states in *Gideon* and *Mapp* had been applicable in the federal courts long before.

trial were as characteristic of the Warren era as the relaxation of these rules is of the contemporary Court.

But to see the Court's shifts only in these broad terms obscures the complexity of the issues that mistrial situations present. The cases have shown time and again the difficulty of identifying the relevant factors and of specifying how they are to be weighed. And individual Justices often have seemed to change their own views concerning the proper approach. Mr. Justice Harlan joined in the majority opinion in *Gori* and in the similarly conceived *Downum* dissent, but he then wrote the sweeping plurality opinion in *Jorn*. Chief Justice Burger joined in the Harlan opinion in *Jorn* as well as in the Court's sharply contrasting opinion in *Somerville*. Then, for a unanimous Court in *Breed v. Jones*,[95] the Chief Justice authored an opinion holding unconstitutional successive trials on the same charges in juvenile and adult court. The opinion makes only passing reference to *Somerville*[96] but relies heavily upon the plurality opinion in *Jorn* for the proposition, crucial to the holding in *Breed*, that the double jeopardy clause protects against the burden of repeated trials even in situations posing no risk of governmental harassment.[97] Mr. Justice White joined in the dissents in both *Downum* and *Jorn*, but in *Somerville* he wrote an opinion that seemed to go beyond *Jorn* in arguing for stringent limitations upon mistrials.

The inconsistency and ambiguity of the Court's mistrial decisions thus are due only in part to changing personnel on the Court and changing attitudes toward law enforcement requirements; to some extent they reflect a genuine uncertainty among the Justices concerning the nature of the competing interests and the appropriate way to reconcile them. As a result, ambiguities necessarily remain after *Somerville* with respect to when a situation might "lend itself to prosecutorial manipulation"; when an alternative should be considered available and what requirements then follow; and, most fundamentally, when

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See Johnson v. Zerbst, 304 U.S. 458 (1938); Weeks v. United States, 232 U.S. 383 (1914).

[95] 421 U.S. 519 (1975).

[96] *Id.* at 539 n.20.

[97] *Id.* at 533. The Court recognized that the successive juvenile and adult trials were not the result of deliberate governmental harassment but were traceable instead to the state's desire to expedite juvenile cases by holding the transfer hearing (at which the juvenile court decides whether to transfer the alleged offender to adult court) simultaneously with the juvenile court hearing to adjudicate guilt. Because the hearing on guilt necessarily covers much of the same ground as the transfer hearing, resolution of the two questions in the same proceeding was not in itself unreasonable.

in mistrial situations the double jeopardy clause might acknowledge an interest against retrial that is independent of the possibility of governmental bad faith. Under these circumstances, the task of a lower court seeking to determine what constitutes "manifest necessity" is not an enviable one. The response of the courts to this challenge nevertheless has been instructive.

D. *Mistrials Since* Somerville: *The Response of the Lower Courts*

The few years since *Somerville* have produced nearly 200 reported appellate decisions involving the propriety of retrial after mistrial. The opinions amply confirm the Supreme Court's recurring observation that mistrial cases "escape meaningful categorization,"[98] but they thoroughly refute the Court's equally frequent but more wishful statement that "it is possible to distill from them a general approach."[99] Little consensus exists among the courts regarding either the factors that should be analyzed or the result that should be reached in recurring factual contexts. This section will examine these decisions in detail in order to identify the few areas in which the decisions tend to agree, and, more importantly, to illuminate some of the causes of the disagreement.[100] For this purpose, it will be useful to consider in turn decisions involving:

1. formal defects in the institution of the proceedings
2. juror disqualification
3. illness of participants
4. unavailability of prosecution witnesses
5. prosecutorial misconduct
6. prejudice or error in taking testimony
7. unpreparedness or tardy action by the defense
8. misconduct by the defense
9. difficulties in a joint trial
10. inability of the jury to agree upon a verdict

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[98] Illinois v. Somerville, 410 U.S. 458, 464 (1973); *see* Gori v. United States, 367 U.S. 364, 369 (1961); Wade v. Hunter, 336 U.S. 684, 689-91 (1949).

[99] Illinois v. Somerville, 410 U.S. 458, 464 (1973); *see id.* at 472 (White, J., dissenting) ("some guidelines have evolved from past cases . . . .").

[100] It should be noted that in all the decisions discussed in this section, mistrial was ordered without the defendant's consent. When the defense itself has sought the mistrial, the request normally is assumed to remove any basis for a subsequent double jeopardy claim. *See* United States v. Dinitz, 96 S. Ct. 1075 (1976). For a discussion of the possible difficulties with this assumption, see text accompanying notes 309-33 *infra*.

1. Formal Defects in the Institution of the Proceedings

Because the *Somerville* mistrial was prompted by a defective indictment, cases involving comparable procedural flaws could be expected to display fairly consistent results. In fact, however, there has been little uniformity in the decisions. When no plausible alternative to mistrial is available, the situation clearly is controlled by *Somerville*. Most courts have followed that decision and have held mistrial proper,[101] but the California Supreme Court has barred reprosecution in the absence of any alternative to mistrial.[102] Some courts also have upheld reprosecution, however, even when the facts suggested that alternatives to mistrial existed. For example, a faulty indictment caused one trial court, sitting without a jury, to declare a mistrial after all testimony had been completed and the case had been submitted for decision. A retrial was permitted even though the alternative of proceeding to judgment in the initial trial, however impracticable in *Somerville*, would have involved no expense or inconvenience in the case under consideration.[103]

Courts that bar retrial frequently base their holdings on a conclusion that the defect in the proceedings was "insubstantial."[104] In such a case, mistrial is considered improper not because the perceived difficulty could have been cured in another way, but because the reviewing court determines that the difficulty would not have required reversal of a conviction and that the mistrial was therefore unnecessary.

A common thread running through these cases is a total disregard of the availability of alternatives. And, putting the California rule to one side, the decisions rather consistently hold retrial permissible if the procedural defect is fatal, but not otherwise. The resulting standard hardly can be considered

[101] *E.g.*, Vaughn v. State, 52 Ala. App. 377, 292 So. 2d 671, *rev'd on other grounds*, 293 Ala. 365, 304 So. 2d 6 (1974), *cert. denied*, 423 U.S. 857 (1975); State v. Berger, 235 N.W.2d 254 (N.D. 1975), *cert. denied*, 425 U.S. 913 (1976).

[102] In People v. Upshaw, 13 Cal. 3d 29, 528 P.2d 756, 117 Cal. Rptr. 668 (1974), trial had commenced without a jury, although the trial court had not obtained a proper jury-trial waiver. As soon as the difficulty was discovered, the trial judge declared a mistrial; retrial was held impermissible even though it was the only conceivable cure for the problem. The California court thus in effect has adopted the position advocated by the *Somerville* dissenters and has prohibited all mistrials except in response to difficulties wholly beyond the control of the prosecution or the trial judge.

[103] State v. Russo, 70 Wis. 2d 169, 233 N.W.2d 485 (1975).

[104] *See, e.g.*, People v. Cobb, 19 Ill. App. 3d 520, 311 N.E.2d 702 (1974); State v. Birabent, 305 So. 2d 448 (La. 1974), *cert. denied*, 425 U.S. 825 (1975). *But cf.* United States v. Sedgwick, 345 A.2d 465 (D.C. 1975), *cert. denied*, 425 U.S. 966 (1976) (mistrial upheld when trial judge's finding of fatal defect was erroneous but not unreasonable).

satisfactory. Under that standard, a court will hold the mistrial order improper, and immunize the defendant from reprosecution, even if the most scrupulous trial judge incorrectly resolved a doubtful issue in the murky law of pleading. A court will approve a mistrial, however, regardless of whether the trial judge diligently attempted to avoid it, if he or she correctly held the flaw to be substantial.[105] *Somerville* may have encouraged this unfortunate result by focusing attention upon the relatively technical question whether a conviction "would have to be reversed on appeal due to an obvious procedural error."[106] Consideration instead should be given to the more relevant questions whether satisfactory alternatives to mistrial existed and whether the trial judge and the prosecutor attempted to discharge their obligations in a responsible manner.

2. Juror Disqualification

The trial court's discovery of grounds for juror disqualification, such as bias, traditionally has been considered one of the obvious grounds for a valid mistrial,[107] and most of the recent cases support this view.[108] Some of these decisions give no consideration to the possible ways of avoiding mistrial; they ignore the possibilities of probing the extent of prejudice, replacing the disqualified juror with an alternate, or removing the juror and proceeding with a reduced panel.[109] Other decisions mention the existence of viable alternatives, yet approve mistrial in spite of them.[110]

One straightforward solution to the juror disqualification problem is simply to proceed with a jury of eleven. Some trial

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[105] The rule allowing mistrial only if the defect is substantial puts the prosecution in the anomalous position of stressing the seriousness of its own error as a ground for allowing retrial, while the accused must defend the prosecution's effort and minimize its shortcomings. *See* text accompanying notes 59-60 *supra*.

[106] Illinois v. Somerville, 410 U.S. 458, 464 (1973).

[107] *Id.* at 463; Gori v. United States, 367 U.S. 364, 371 (1961) (Douglas, J., dissenting).

[108] *See, e.g.*, United States *ex rel.* Stewart v. Hewitt, 517 F.2d 993 (3d Cir. 1975); Whitfield v. Warden, 486 F.2d 1118 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974); People v. Merrill, 18 Ill. App. 3d 506, 310 N.E.2d 27 (1974); *cf.* Cornish v. State, 272 Md. 312, 322 A.2d 880 (1974) (disqualification of judge in trial without jury).

[109] *See, e.g.*, Williamson v. Sheriff, 89 Nev. 507, 515 P.2d 1028 (1973); Commonwealth v. Stewart, 456 Pa. 447, 317 A.2d 616, *cert. denied*, 417 U.S. 949 (1974). *But see* Commonwealth v. Cohen, 65 Pa. D. & C.2d 62 (1974).

[110] *See, e.g.*, United States *ex rel.* Stewart v. Hewitt, 517 F.2d 993 (3d Cir. 1975); Jones v. Anderson, 404 F. Supp. 182 (S.D. Ga. 1974), *aff'd mem.*, 522 F.2d 181 (5th Cir. 1975); State v. McDonald, 298 Minn. 449, 215 N.W.2d 607 (1974).

judges attempt to obtain the parties' consent to this approach,[111] but, at least in the federal courts, the eleven-member panel is not considered an available alternative to mistrial if either the defendant or the prosecutor objects to it.[112]

The courts justify their failure to pursue other alternatives on a wide variety of grounds. One federal district court approved a state court's failure to seat a replacement juror in part because this option was "permissive, rather than mandatory" under state law.[113] The Fifth Circuit upheld a retrial after mistrial in a Mississippi murder prosecution even though an alternate juror already selected could have readily replaced the disqualified member of the panel.[114] The court apparently relied on the rather flimsy ground that the trial judge thought the substitution might arouse irrelevant speculation among the remaining jurors. It might be an exaggeration to conclude that these juror disqualification cases dispense with any obligation to explore alternatives. Nevertheless, the courts seem to give extraordinary deference to a trial judge's decision to reject an alternative.

Several state courts have taken the lead in insisting upon a stricter approach. Courts in Maryland[115] and Illinois[116] have found a double jeopardy violation when the judge aborted a trial without investigating the extent of bias or the possibility of correcting it by cautionary instructions. A New Mexico court has held that mistrial was improper in the absence of a thorough exploration of alternatives and an explicit statement by the trial judge of his reasons for rejecting them.[117]

The juror disqualification cases differ significantly from those involving defects in the institution of the proceedings.

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[111] *See, e.g.*, Parker v. United States, 507 F.2d 587 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

[112] *See* United States v. Means, 513 F.2d 1329 (8th Cir. 1975); Parker v. United States, 507 F.2d 587 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). *See also* Patton v. United States, 281 U.S. 276 (1930). FED. R. CRIM. P. 23(b) has been read to prohibit juries of less than 12 members in this situation except upon stipulation of both parties and the consent of the trial judge. *See* note 287 *infra*.

[113] Jones v. Anderson, 404 F. Supp. 182, 187 (S.D. Ga. 1974), *aff'd mem.*, 522 F.2d 181 (5th Cir. 1975).

[114] Smith v. Mississippi, 478 F.2d 88 (5th Cir.), *cert. denied*, 414 U.S. 1113 (1973).

[115] Carey v. State, 30 Md. App. 594, 353 A.2d 650 (1976).

[116] People v. Phillips, 29 Ill. App. 3d 529, 331 N.E.2d 163 (1975); People v. Cobb, 19 Ill. App. 3d 520, 311 N.E.2d 702 (1974).

[117] State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App. 1975); *cf.* Commonwealth v. Cohen, 65 Pa. D. & C.2d 62 (1974) (emphasizing the trial judge's duty to specify why mistrial is necessary).

Juror disqualification ordinarily results from events wholly beyond the control of judge and prosecutor.[118] Accordingly, little danger exists that the mistrial problem was triggered by governmental manipulation. If the only purpose of double jeopardy protection is to guard against this danger, as *Somerville* may suggest, arguably a search for alternative solutions is unnecessary and mistrial should be allowed freely in juror disqualification situations. On the other hand, the absence of manipulation does not lessen the burden of retrial upon the defendant. If protection against imposition of this burden, as stressed in *Jorn*, remains part of the function of the double jeopardy clause after *Somerville*, a scrupulous search for alternatives, as required by a minority of the cases, remains appropriate. Interestingly, decisions taking a more permissive attitude toward retrial do not explicitly attempt to justify their approach in terms of the lack of any danger of manipulation. Indeed, in most of them such a justification would have been difficult to advance because facts often suggested that the judge's failure to examine alternatives may have proved helpful to the prosecution.[119] In fact, the very existence of alternatives inevitably creates an opportunity for manipulation in choosing among them, regardless of the source of the original difficulty. The cases thus suggest the importance of providing some control over the trial judge's choice of alternatives, even under the narrower *Somerville* conception of the policies served by double jeopardy protection.

3. Illness of Participants

Courts that have considered mistrials based on illness of a participant have reached conflicting results. The outcome of such cases may depend, at least in part, upon which participant becomes ill. Mistrials triggered by illness of the defendant, defense counsel, or the trial judge have been upheld even without

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[118] In some of the cases, however, contamination of the jury apparently resulted from negligence on the part of other court officials, such as the bailiff or the marshal responsible for the jury. *See, e.g.*, Whitfield v. Warden, 486 F.2d 1118 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974); Smith v. Mississippi, 478 F.2d 88 (5th Cir.), *cert. denied*, 414 U.S. 1113 (1973).

[119] In most of the cases involving a refusal to probe the extent of prejudice or a refusal simply to caution the juror, the potential bias was apparently in favor of the defense. *See, e.g.*, Smith v. Mississippi, 478 F.2d 88 (5th Cir.), *cert. denied*, 414 U.S. 1113 (1973); Jones v. Anderson, 404 F. Supp. 182 (S.D. Ga. 1974), *aff'd mem.*, 522 F.2d 181 (5th Cir. 1975); State v. McDonald, 298 Minn. 449, 215 N.W.2d 607 (1974); Williamson v. Sheriff, 89 Nev. 507, 515 P.2d 1028 (1973).

the defendant's consent.[120] These mistrials were accepted uncritically as "necessary" even though possibilities for a continuance, replacement of trial counsel, or replacement of the judge[121] had not been explored at the trial. Illness of a juror raises essentially the same questions as those presented in juror disqualification cases. Although ordinarily an alternate juror will be seated if one is available, the court usually will not proceed with a reduced panel if either party objects.[122]

Illness of the prosecutor apparently prompts a stricter judicial attitude. In several cases, state courts have barred retrial because a substitute prosecutor could have been assigned.[123] Yet these decisions did not suggest the possibility of feigning or manipulation and did not distinguish expressly the problem of illness of the prosecutor from that of illness of defense counsel. These courts therefore might take an equally strict approach with regard to illness of other parties.

The illness cases, like those involving juror bias, indicate possibilities for manipulation even when a problem is ostensibly beyond the prosecutor's control, and the willingness of trial judges to overlook alternatives to mistrial could be colored by their impression of whether a second proceeding would provide improved prospects for the government. Therefore, the strict approach implicit in some of these decisions may be appropriate even when illness of the defendant is involved.

4. Unavailability of Prosecution Witnesses

Essential testimony sometimes becomes unavailable because government preparation has been sloppy or because witnesses become ill or disappear through no fault of the prosecution. If anything remains of *Downum*, mistrials should be held improper when prosecutorial error accounts for the unavailability of a witness, and the cases broadly support this view. In most of these

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[120] *See, e.g.*, United States v. Wayman, 510 F.2d 1020 (5th Cir. 1975), *cert. denied*, 423 U.S. 846 (1976) (defense counsel injured in accident); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573, *cert. denied*, 423 U.S. 934 (1975) (illness of judge); Glover v. United States, 301 A.2d 219 (D.C. 1973) (illness of defendant).

[121] Replacement of the trial judge is not authorized in all jurisdictions, *see* text accompanying note 304 *infra*, but apparently it is authorized in Pennsylvania, where Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975), *cited in* note 120 *supra*, arose. *See* PA. R. CRIM. P. 1105(c). *But see* Commonwealth v. Clay, 224 Pa. Super. Ct. 461, 307 A.2d 341 (1973) (criticizing replacement). *See also* FED. R. CRIM. P. 25(a).

[122] *See* note 112 *supra*.

[123] Jourdan v. State, 275 Md. 495, 341 A.2d 388 (1975); Commonwealth v. Brooks, 225 Pa. Super. Ct. 247, 310 A.2d 338 (1973).

cases the justification for mistrial was particularly weak because the alternative of granting a continuance would have readily solved the problem.[124] Courts have barred retrial, however, even in the absence of any alternative. For example, in *McNeal v. Hollowell*,[125] one of the state's principal witnesses, an alleged accomplice to the murder at issue, unexpectedly claimed the privilege against self-incrimination. Although the prosecutor might have prevented this eventuality by taking a variety of steps before trial, the difficulty could not be cured promptly once it arose. The Fifth Circuit nevertheless held mistrial improper. The court noted that the prosecutor had taken a gamble with a doubtful witness and lost; to permit mistrial would create the "tantalizing potential" for manipulation that the Supreme Court had warned against in *Somerville*. *McNeal* and an analogous decision in the Second Circuit[126] apparently establish that—whatever the rule in cases of faulty preparation of an indictment—faulty arrangements by the government for presenting its testimony will not justify mistrial even in the absence of viable alternatives.[127]

A different result often occurs when a properly subpoenaed witness fails to appear through no fault of the government. For example, in *United States* ex rel. *Gibson v. Ziegele*,[128] mistrial had been declared by a New Jersey trial court in a murder prosecution because a police officer who was to testify concerning the defendant's confession became ill. Although another police officer could have testified for this purpose, and although the record contained indications that the prosecutor's case had been going poorly, the Third Circuit held that the mistrial decision

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[124] *E.g.*, Fanning v. Superior Ct., 320 A.2d 343 (Del. 1974); State *ex rel.* Mitchell v. Walker, 294 So. 2d 124 (Fla. Dist. Ct. App. 1974).

[125] 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S 951 (1974).

[126] United States v. Glover, 506 F.2d 291 (2d Cir. 1974), *discussed in* note 157 *infra*. These decisions confirm the demise of Brock v. North Carolina, 344 U.S. 429 (1953), *discussed in* text accompanying notes 38-39 *supra*.

[127] In *McNeal*, the case against retrial was particularly strong because one government witness had given testimony unexpectedly favorable to the accused; mistrial therefore deprived the defendant of an important tactical advantage independent of the other witness' refusal to testify. United States v. Glover, 506 F.2d 291 (2d Cir. 1974), *discussed in* note 157 *infra*, however, did not appear to involve any specific prejudice to the defendant apart from the fact that retrial would have permitted the government to use the missing witness' testimony; nevertheless, mistrial was held improper even in the absence of alternatives. The prevailing rule is of course quite different when governmental error relates to the preparation of the indictment rather than the preparation of testimony. *See* text accompanying notes 101-03 *supra*.

[128] 479 F.2d 773 (3d Cir.), *cert. denied*, 414 U.S. 1008 (1973).

was within the trial judge's discretion.[129] The decision treated rather lightly the obligation to canvass alternatives, but it can be read at least as assuming that some such obligation exists.[130] In any event, *Gibson* plainly holds that when alternatives are deemed unavailable and when governmental error is not responsible for the witness' absence, retrial will be permitted.[131]

This approach has not been adopted by all courts; at least two recent decisions have held retrial barred by the double jeopardy clause even after repeated continuances had failed to secure the availability of a properly subpoenaed witness.[132] This strict attitude toward mistrials that are triggered when a witness is missing through no fault of the government stands in contrast to the prevailing approach to mistrials that are prompted by the illness or indisposition of a judge or juror. Mistrials of the second sort often are upheld with little or no attempt to explore viable alternatives.[133] There is, of course, no reason to distinguish between uncontrollable events that incapacitate a judge and those that prevent the appearance of an essential witness. But courts that have been conditioned to regard the former as causing a "breakdown in judicial machinery" and the latter as causing a mere failure of proof perhaps understandably have displayed great permissiveness in one situation and great stringency in the other.

5. Prosecutorial Misconduct

Prosecutorial misconduct—such as an improper opening statement, improper questioning of a witness, or failure to make

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[129] Although the court emphasized that the other police officer would not have been able to testify that *Miranda* warnings had been given, its opinion does not suggest that this difficulty had been relied upon by the trial judge, and when the problem was raised during the appeal, the defense counsel noted that he would have been willing to stipulate to the warnings. *See id.* at 777-78.

[130] *See also* Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971).

[131] The same result may follow if the prosecution can establish that its difficulties resulted from misconduct by the defense. *Cf.* Baker v. State, 15 Md. App. 73, 289 A.2d 348 (1972), *cert. denied*, 411 U.S. 951 (1973) (subornation of perjury observed by judge in courtroom). In most cases, however, courts have rejected attempts to pin responsibility on the defense. *E.g.*, McNeal v. Hollowell, 481 F.2d 1145, 1151-52 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); People v. Davis, 79 Misc. 2d 137, 359 N.Y.S.2d 637 (Sup. Ct. 1974); *cf.* United States v. Whitman, 473 F.2d 910 (6th Cir.), *vacated on other grounds*, 480 F.2d 1028 (6th Cir. 1973) (defendant caused delay leading to dismissal of the jury).

[132] United States v. Whitman, 473 F.2d 910, (6th Cir.), *vacated on other grounds*, 480 F.2d 1028 (6th Cir. 1973); People v. Davis, 79 Misc. 2d 137, 359 N.Y.S.2d 637 (Sup. Ct. 1974).

[133] *See* text accompanying notes 120-22 *supra*.

required disclosures to the defense—often will prompt an affirmative motion by the defendant for mistrial. This occurred in virtually all the recent mistrial cases involving prosecutorial misconduct; accordingly, the decisions rejecting double jeopardy claims rest largely on the theory, which will be examined below,[134] that the defendant in effect consented to retrial.[135] In at least one case, however, a mistrial opposed by the defendant was held proper on the ground that the judge's motive had been to benefit the defense.[136] This reflects a rather plain refusal to accept the interment of *Gori* by *Jorn*.[137]

6. Prejudice or Error in Taking Testimony

Even in the absence of misconduct by counsel, improper evidence may be, and of course often is, aired before the jury. If the testimony is relatively insignificant, the jury simply may be instructed to disregard it, but if the evidence is highly prejudicial, counsel often will seek a mistrial to ensure that a truly unbiased finder of fact will decide the case. When mistrial orders of this kind are entered at the request of the prosecution, most courts considering double jeopardy claims scrutinize closely the need for mistrial. In one heroin prosecution, for example, an interpreter improperly translated the Chinese dialect used by a key government witness.[138] The trial court granted the government's motion for mistrial so that a qualified translator could be found and the testimony rendered properly. Because portions of the original testimony had tended to exculpate one of the defendants, the mistrial proved to be a great advantage to the prosecution, which decided not to use the witness at all in the second trial. The Fifth Circuit barred the retrial because alternatives had not been considered[139] and because the opportunity that had been given the prosecution to strengthen its case

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[134] *See* text accompanying notes 309-33 *infra*.

[135] *See, e.g.*, United States v. Beasley, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924 (1973); People v. Forbis, 12 Ill. App. 3d 536, 298 N.E.2d 771 (1973); People v. Counts, 44 App. Div. 2d 841, 355 N.Y.S.2d 644 (1974); Commonwealth v. McGlory, 226 Pa. Super. Ct. 493, 313 A.2d 326 (1973); State v. Calhoun, 67 Wis. 2d 204, 226 N.W.2d 504 (1975).

[136] United States v. Sedgwick, 345 A.2d 465 (D.C. 1975), *cert. denied*, 425 U.S. 966 (1976). *See also* Rentoul v. State, 301 A.2d 284 (Del. 1973).

[137] *See* text accompanying notes 70-73 *supra*.

[138] United States v. Kin Ping Cheung, 485 F.2d 689 (5th Cir. 1973).

[139] *Id.* at 691. The court noted that the trial judge could have ordered a short continuance while a new translator was obtained and could have instructed the jury to disregard contested portions of the translation.

upon retrial had created a "tantalizing potential for . . . misconduct."[140]

By refusing to defer to the trial judge's implicit rejection of problematical alternatives, in a case in which judgment was peculiarly dependent upon the impact of testimony in "the heated atmosphere of trial," the Fifth Circuit applied a notably strict double jeopardy standard. The court's approach probably was appropriate because the mistrial undeniably had prejudiced the tactical position of the defense. It is nevertheless disappointing that the court evinced no awareness that its standard differed so strikingly from the one it had employed on other occasions.[141]

When the improper testimony is prejudicial to the defendant, mistrials granted on a defense motion usually will not bar retrial.[142] Several cases, however, have upheld mistrials ordered by the trial judge sua sponte, on the ground that the action was intended to benefit the defendant.[143] These cases simply ignore the emphatic condemnation of this rationale in *Jorn*.[144]

7. Unpreparedness or Tardy Action by the Defense

When a mistrial is declared because of negligence on the part of the defense, courts usually allow retrial without careful examination of the available alternatives. In one federal

[140] *Id.* at 692 (quoting McNeal v. Hollowell, 481 F.2d 1145, 1150 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974)).

[141] *See, e.g.*, Smith v. Mississippi, 478 F.2d 88 (5th Cir.), *cert. denied*, 414 U.S. 1113 (1973). *See also* United States v. White, 524 F.2d 1249 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2629 (1976), *discussed in* text accompanying notes 145-47 *infra*. For other cases barring retrial because alternatives were available to cure the prejudice to the prosecution, see State v. Sedillo, 88 N.M. 240, 243, 539 P.2d 630, 633 (Ct. App. 1975); State v. Embry, 19 Or. App. 934, 942, 530 P.2d 99, 103 (1974).

Although no recent decisions have found mistrial to be the only available means for curing an error seriously harmful to the prosecution, the cases seem to assume that mistrial would be permissible when the harm to the prosecution could be remedied in no other way. The defendant is, of course, "prejudiced" by an order intended to give the government a better case upon retrial, but imposing this sort of prejudice seems to be considered proper if the advantage lost by the defense was an illegitimate one and alternative solutions were wanting.

[142] *See, e.g.*, Conner v. Deramus, 374 F. Supp. 504 (M.D. Pa. 1974); State v. Wright, 112 Ariz. 446, 543 P.2d 434 (1975); City of Tucson v. Valencia, 21 Ariz. App. 148, 517 P.2d 106 (1973); Lawson v. State, 304 So. 2d 522, 524 (Fla. Dist. Ct. App. 1974); State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975); *cf.* United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974) (defense counsel's motion for mistrial was based on his own ineffectiveness).

[143] Neal v. State, 272 Md. 323, 322 A.2d 887 (1974); State v. Wiley, 324 N.E.2d 287 (Ohio Ct. App. 1975).

[144] *See* text accompanying notes 70-73 *supra*. A District of Columbia court also applied this rationale in a decision involving a mistrial precipitated by prosecutorial misconduct. United States v. Sedgwick, 345 A.2d 465 (D.C. 1975), *cert. denied*, 425 U.S. 966 (1976); *see* text accompanying notes 134-37 *supra*.

prosecution,[145] the defendant had failed to move for a psychiatric examination until after the jury had been sworn. The trial judge allowed the untimely motion, but he declined to recess the trial pending completion of the examination and instead declared a mistrial. The Fifth Circuit held the mistrial order proper in part because the alternative of a continuance would have "exposed the jurors to the possibility of extraneous and impermissible influences."[146] This concern was at best premature because the need for mistrial could have been determined, under the usual standards for juror disqualification,[147] if and when jurors actually were exposed to an extraneous influence. Other decisions, however, go even further and approve mistrial orders triggered by an untimely defense motion, without any consideration of possible alternatives to mistrial.[148]

The apparent willingness of reviewing courts to accept superficial reasons for bypassing an alternative may reflect confidence that prosecutorial manipulation is absent when a trial problem has been caused by negligence on the part of the defense. But, as was noted in the discussion of cases of illness and juror disqualification,[149] selection among alternatives always presents an opportunity for the trial judge to choose the option most favorable to conviction, even when the government bears no responsibility for the initial difficulty. Surprisingly, one of the courts that recognized this danger in the context of illness and juror disqualification ignored the alternatives question altogether in a case involving error by the defense.[150]

8. Misconduct by the Defense

Improper defense tactics might be thought to justify mistrials even more readily than mere negligence on the part of the

[145] United States v. White, 524 F.2d 1249 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2629 (1976).

[146] *Id.* at 1252.

[147] *See* text accompanying notes 107-17 *supra*. Compare the Fifth Circuit's approach in United States v. Kin Ping Cheung, 485 F.2d 689 (5th Cir. 1973), *discussed in* text accompanying notes 138-41 *supra*.

[148] *E.g.*, State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App. 1976). If an untimely motion to suppress forecloses the government's right to appeal a suppression order, mistrial may become necessary. *See, e.g.*, United States v. Moon, 491 F.2d 1047 (5th Cir. 1974). The *Aragon* court explicitly declined to rely on this theory—the state having indicated no desire to appeal—but nonetheless held that mistrial was proper.

[149] *See* text accompanying notes 119-23 *supra*.

[150] *Compare* State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App. 1976) (defense error), *discussed in* note 148 & accompanying text *supra*, *with* State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App. 1975) (juror disqualification), *discussed in* text accompanying note 117 *supra*.

defense. In fact, the opposite seems to be the case. A number of courts have barred retrial even when mistrial was triggered by absence of the defendant, impermissible cross-examination, or persistently objectionable behavior by defense counsel. These courts found mistrial improper in such situations either because the trial court failed to invoke alternatives such as recessing the trial, cautioning the jury, or admonishing counsel,[151] or because the misconduct was not sufficiently serious to require mistrial.[152] Even when the misbehavior has appeared prejudicial to the defense, and the trial judge seemingly sought to protect the defendant by the mistrial order, courts have prohibited retrial.[153]

Strict scrutiny in these cases may reflect distrust of trial judge action that is induced by obviously irritating or antagonistic behavior of the defendant or defense counsel. Reviewing courts may assume that the trial judge will pass more dispassionately upon difficulties occasioned by excusable neglect. Nevertheless, the far more permissive standard that seems to prevail in the latter situation[154] remains difficult to justify.[155]

9. Difficulties in a Joint Trial

When any of the trial problems already considered arises in a case involving more than one defendant, the retrial issue becomes much more complex. The easiest cases for the courts to decide involve situations in which the underlying difficulty would not justify a mistrial for the defendant primarily affected by it. In such situations, the courts correctly bar reprosecution of the second defendant as well as the first.[156] Similarly, a judge's

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[151] *See* United States v. Tinney, 473 F.2d 1085 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973) (failure to grant continuance); State v. Sedillo, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975) (failure to cure defense counsel misconduct by instruction to the jury); Commonwealth *ex rel.* Riddle v. Anderson, 227 Pa. Super. Ct. 68, 323 A.2d 115 (1974) (failure to admonish counsel). *But see* State *ex rel.* Walter v. Lee, 320 So. 2d 450 (Fla. Dist. Ct. App. 1975) (mistrial due to defendant's absence held proper).

[152] *See, e.g.*, Espinoza v. District Court, 180 Colo. 391, 506 P.2d 131 (1973). For a leading pre-*Somerville* case to the same effect, see Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967).

[153] United States v. Bristol, 325 A.2d 183 (D.C. 1974); Commonwealth *ex rel.* Riddle v. Anderson, 227 Pa. Super. Ct. 68, 323 A.2d 115 (1974).

[154] *Compare* State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App. 1976) (mistrial upheld although untimely motion to suppress was excusable misconduct), *with* State v. Sedillo, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975) (mistrial held improper even though defense misconduct resulted in contempt citation).

[155] *See* text accompanying notes 146-50 *supra*.

[156] For example, in Fanning v. Superior Court, 320 A.2d 343 (Del. 1974), one defendant had demanded time to consult an expert before the admission into evidence of a government expert's report, but her codefendant raised no objection to the evidence.

willingness to sever the cases and limit the mistrial to only one defendant does not dispense with the need to determine whether even the limited mistrial was appropriate.[157]

Determining the legitimacy of mistrial in the joint trial context becomes more difficult when mistrial for one of the defendants would be considered proper. For example, in *Whitfield v. Warden*,[158] two black defendants were tried on charges of murder and conspiracy in a Maryland court. While motions were being argued at the end of the prosecution's case-in-chief, one of the jurors—the only black on the panel—wandered into the courtroom. Whitfield's lawyer wished to proceed with either the original juror or the alternate, who was white. Counsel for codefendant Baker, however, moved for a mistrial. The trial judge felt that seating the alternate would be unfair to Baker and declared a mistrial with respect to both defendants. After retrial, the Fourth Circuit held that the second prosecution did not subject Whitfield to double jeopardy. Although mistrial could have been avoided by severing the charges against Whitfield, the court held that severance need not be selected as an

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The trial judge responded by declaring a mistrial for both defendants. On appeal, the state supreme court properly barred the retrial of the first defendant, because a short continuance would have met her needs; a fortiori, the court held that reprosecution of the second defendant was also impermissible.

[157] Joint trials involving confessions illustrate this point. Under Bruton v. United States, 391 U.S. 123 (1968), the confession of one defendant, though legally obtained, may not be introduced in a joint trial if he or she does not take the stand and if the confession contains material damaging to a codefendant. In several recent cases, a prosecutor facing suppression under *Bruton* of a valid confession sought a mistrial so that the defendants could be prosecuted separately and the statement used against the defendant who had made it. In two of these cases, the trial judge severed the actions and aborted only one of the prosecutions. Nevertheless, courts subsequently barred retrial of the defendant whose original prosecution had been aborted. United States v. Glover, 506 F.2d 291 (2d Cir. 1974) (mistrial for the defendant who had confessed); Painter v. Martin, 531 P.2d 341 (Okla. Crim. App. 1974) (confession used in first trial; mistrial for the defendant who had not confessed).

Once trial begins in these cases, the difficulty cannot be avoided by any alternative short of the limited mistrial. Nevertheless, the decisions holding mistrial improper are correct because the problem results solely from the government's negligent failure to seek severance prior to trial. *Cf.* McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (witness unavailability due to prosecution negligence), *discussed in* text accompanying notes 125-27 *supra*. *See also* text accompanying note 266 *infra*. Given these decisions, the prosecutor who neglects to seek severance before trial faces the dilemma of choosing either to proceed without the confession or to use the confession against the defendant who made it and accept dismissal of the other defendant's case. Clearly the prosecution cannot gain by proceeding solely against the defendant who did not confess, as the government did in *Glover*, because the confession still cannot be used in the first trial and retrial of the defendant who confessed will be barred.

[158] 486 F.2d 1118 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974).

alternative to mistrial in a conspiracy prosecution because of the "problems and prejudices" that this course might create for the government.[159] The Eighth Circuit reached a similar result in *Parker v. United States*.[160] There, after exposure to prejudicial publicity had disqualified one juror, Parker agreed to proceed with a jury of eleven, but his codefendant refused. The court upheld the trial judge's refusal to sever and his declaration of mistrial with respect to both defendants. Two recent cases from the Fifth and Sixth Circuits have reached the opposite result, holding that when valid grounds for mistrial arise with respect to one defendant, and the judge fails to sever and proceed with the case against the other, retrial of the latter defendant is barred.[161]

Neither the decisions allowing retrial nor those barring retrial provide much elaboration of their conclusions. For example, the Sixth Circuit case barring the codefendant's retrial indicated simply that severance was the appropriate remedy,[162] while the Fifth Circuit, in the most recent of the four decisions, stated flatly that "[m]ere judicial convenience in handling coconspirators in the same trial has never been held to constitute an interest in the magnitude of a 'manifest necessity.' "[163] A conflict of this kind probably was inevitable because the Supreme Court's opinion in *Somerville*, with its ambivalent treatment of the alternatives analysis in *Jorn*, provided little guidance for determining when the government's interest in trying cases jointly becomes sufficiently important to justify rejection of the severance alternative.[164]

10. Inability of the Jury To Agree upon a Verdict

Courts traditionally have regarded the "hung" jury, which alone accounts for several thousand mistrials each year,[165] as the classic basis for a valid mistrial.[166] Although the recent cases uniformly profess adherence to this general principle, it has be-

[159] *Id.* at 1124.

[160] 507 F.2d 587 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

[161] United States v. Alford, 516 F.2d 941 (5th Cir. 1975); Thomas v. Beasley, 491 F.2d 507 (6th Cir.), *cert. denied*, 417 U.S. 955 (1974).

[162] Thomas v. Beasley, 491 F.2d 507, 510 (6th Cir.), *cert. denied*, 417 U.S. 955 (1974).

[163] United States v. Alford, 516 F.2d 941, 947 (5th Cir. 1975).

[164] *See* text accompanying notes 86-87 *supra*. For a suggested resolution of this issue, see text accompanying notes 294-302 *infra*.

[165] Kalven and Zeisel estimated that in 1955, more than five percent of all criminal jury trials, or approximately 3000 trials in that year, had ended in hung juries. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 453 (1966).

[166] *See* Gori v. United States, 367 U.S. 364, 370-71 (1961) (Douglas, J., dissenting).

come a largely meaningless rubric because courts differ so sharply in their conception of what constitutes genuine "inability" of a jury to agree.

This disagreement among courts is due in part to the variations in the thoroughness of accepted techniques for preventing jury deadlock. Good trial practice requires a judge to determine whether further deliberations will be futile by questioning the jurors and by considering the nature and complexity of the case, the length of the trial, and the time spent in deliberations.[167] A judge may summon the jury to inquire into the status of its deliberations or may follow instead the more cautious procedure of waiting until the jury takes the initiative. The judge may question only the foreperson or may poll the other jurors as well. A jury's firm statement of deadlock may be accepted by the judge or further deliberations may instead be required, with or without additional instructions relating to elements in the case, the burden of proof, or the nature of the unanimity requirement.

The hung-jury problem thus resembles other trial difficulties in that a range of alternatives to immediate mistrial may be available. In the hung-jury situation, however, efforts to break deadlock inherently involve a degree of pressure that may, precisely because of its success, taint the fairness of the resulting verdict. The judge accordingly must tread a thin line between discharging a jury too quickly and not discharging it quickly enough.

Given these constraints, the prevailing approach among courts deciding double jeopardy claims has been to accord great deference to the trial judge's finding that the jury was unable to agree.[168] Indeed, most courts uphold mistrials even when the trial judge relied on the foreperson's statement without polling the other jurors,[169] failed to assure that the deadlock applied to all counts,[170] or denied a defense request to reread the charge on the burden of proof.[171]

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[167] ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4(c), Comment at 157 (1968).

[168] *See, e.g.*, United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); Jessen v. State, 234 Ga. 791, 218 S.E.2d 52 (1975); Commonwealth v. Fredericks, 235 Pa. Super. Ct. 78, 340 A.2d 498 (1975).

[169] *See, e.g.*, United States v. Rodriguez, 497 F.2d 172 (5th Cir. 1974); Thames v. Justices of Superior Court, 383 F. Supp. 41 (D. Mass. 1974); State v. Nelson, 234 N.W.2d 368, 375 (Iowa 1975); State v. Pruitt, 216 Kan. 103, 107, 531 P.2d 860, 863 (1975); White v. State, 23 Md. App. 151, 166, 326 A.2d 219, 228 (1974).

[170] *See, e.g.*, United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

[171] *See, e.g.*, United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975).

United States v. Beckerman,[172] though not the worst of these decisions, is probably typical of this approach. In a relatively uncomplicated narcotics prosecution, the jury sent the judge a deadlock note late in the evening but after only three hours of deliberation. In response to the judge's question whether agreement might be reached with more time, the following colloquy ensued:

> The Forelady: It is very hard to say. We are all very tired . . . maybe another time, another day we may be clearer.
> The Court: The question I asked you was whether you thought with more time you would be able to reach a verdict, so the answer is no, is that it?
> The Forelady: The way it seems now, it doesn't seem as though we will be able to.
> [Defense Counsel]: May I make a suggestion?
> The Court: No, you may not. Thank you very much. The Court is going to declare a mistrial, the jury is excused.[173]

Despite available alternatives, such as allowing the jury to rest overnight, and despite the judge's flat refusal to consider the views of defense counsel, the Second Circuit upheld this mistrial declaration. The court stated that the judge was entitled to accept the deadlock claim "at face value" and interpreted *Somerville* as reaffirming the *Gori* notion of broad discretion for the trial judge. The court concluded by "[c]autioning against scrutinizing the exercise of that discretion."[174]

Some courts have given closer scrutiny to the trial judge's hung-jury determination, although their decisions seem to represent a minority position. In *United States* ex rel. *Russo v. Superior Court*,[175] a New Jersey murder prosecution had been aborted after nine hours of jury deliberation because the judge

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[172] *Id.*

[173] *Id.* at 908.

[174] *Id.* at 908, 910. For another example of a relatively permissive approach, see Commonwealth v. Monte, 459 Pa. 495, 329 A.2d 836 (1974), in which the court upheld a Philadelphia trial judge's decision to relieve the jury of further deliberations on the ground that it would be unsafe for them to return home at a later hour. The court noted, however, that the trial judge had "every reason to believe that further deliberations would have been futile." *Id.* at 505, 329 A.2d at 841. *See also* State v. Nelson, 234 N.W.2d 368 (Iowa 1975) (holding that although it would have been preferable for the judge to ask the jury to return in the morning for further deliberations, failure to do so was not an abuse of discretion).

[175] 483 F.2d 7 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973).

believed that the jury was exhausted. The Third Circuit held retrial barred by the double jeopardy clause. Although the mistrial determination was peculiarly dependent upon firsthand observation and presumably was designed to protect all parties from an ill-considered verdict, the court rejected the trial judge's finding as unsupported by the record because the jury itself had not formally complained of exhaustion.[176]

Russo was extended significantly in *United States* ex rel. *Webb v. Court of Common Pleas*.[177] In *Webb*, the judge had summoned the jury and inquired whether "your positions are so adamant that you couldn't possibly arrive at a unanimous verdict?" The foreperson had responded firmly, "Yes, sir . . . ."[178] The Third Circuit nevertheless held the mistrial improper. The opinion stressed the "narrow limits" upon a trial judge's discretion and took its cue from passages in *Somerville* that stated that the exercise of this discretion is to be "scrutinized."[179] As in *Russo*, the court saw a potential for manipulation because the judge had taken the initiative in raising the deadlock question. In such a situation, the judge's readiness to cut off deliberations could be influenced by his or her impression of their probable outcome.[180] Furthermore, because the judge had not expressly polled each juror, the record did "not furnish an adequate showing that it was the collective sentiment of the jury that they had reached an impasse."[181] The *Webb* opinion thus requires a trial court to question each juror whenever the jury has not spontaneously claimed deadlock.[182] A few other decisions also suggest

[176] *Id.* at 16-17. *See also* State v. Fenton, 19 Ariz. App. 274, 506 P.2d 665 (1973); Tuite v. Shaw, 49 App. Div. 2d 737, 372 N.Y.S.2d 219 (1975); United States v. See, 505 F.2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (no abuse of discretion where judge polled jurors and made extensive deadlock determination).

[177] 516 F.2d 1034 (3d Cir. 1975).

[178] *Id.* at 1036.

[179] *Id.* at 1042 (quoting Illinois v. Somerville, 410 U.S. 452, 462-63 (1973)).

[180] This danger was particularly acute in *Russo* because of allegations that the jury's deliberations had been overheard through the thin walls of the jury room. 483 F.2d at 9. But the court disclaimed reliance on this factor, stressing that an examination of possible manipulation in particular cases would cause the court to "become embroiled in embarrassing inquiries." *Id.* at 16 n.15. Likewise, in *Webb*, the court stressed that there had been no hint of manipulation and that its conclusion rested solely on the general danger that "the procedure utilized by the trial judge here to determine whether there was a hung jury is open to abuse." 516 F.2d at 1044 n.57.

[181] 516 F.2d at 1044.

[182] The court mentioned, however, that there "might" be less necessity for polling the other jurors when the jury has spontaneously claimed deadlock, because "the jury would presumably have reached a consensus before reporting its deadlock to the judge." *Id.* at 1044 n.56.

It should be noted that *Webb* involved a challenge to the discharge of the jury at

that a court's initiation of deadlock inquiries[183] or its failure to question the jurors individually[184] may render a mistrial improper, and at least one recent case suggests that failure to provide supplementary instructions or to insist upon continued deliberations after a jury's first protestation of deadlock may have the same effect.[185] Such decisions probably allow some flexibility in the judge's response to potential deadlock situations, but they plainly require trial judges, before dismissing a hung jury, to build a record sufficiently substantial to survive searching review by a court examining a double jeopardy claim.

The decisions thus reflect sharply contrasting perceptions of the nature of the jury deadlock problem. Most courts view a hung jury as a special situation that involves little danger to the defendant and that justifies mistrial almost automatically. An important minority, however, recognizes the potential for abuse in this situation and consequently subjects mistrial decisions to the most rigorous scrutiny.

11. The Current State of the Law

The first step toward understanding the current state of double jeopardy law in mistrial cases is to abandon all pretense of explaining the decisions in terms of the "manifest necessity standard." That standard cannot explain the welter of criteria utilized by the courts for determining the propriety of mistrial.

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the defendant's *second* trial. The first trial also had ended in a hung jury, and the court mentioned this fact as one "mandating the exercise of even greater caution" before discharging the second jury. *Id.* at 1045. Although one commentator has concluded that *Webb*'s restrictions upon the trial judge's discretion apply only in this situation, Note, *Double Jeopardy: Discretion of a Trial Judge to Declare a Mistrial on the Basis of a Hung Jury*, 44 FORDHAM L. REV. 389, 395 (1975), the decision cannot be limited to this situation. *Russo* involved only one trial, and the *Webb* court stressed the extensive obligations of the trial judge and reviewing court in hung jury situations generally; the court referred to the prior hung jury as merely a "final factor." 516 F.2d at 1045.

[183] *See* Tuite v. Shaw, 49 App. Div. 2d 737, 372 N.Y.S.2d 219 (1975).

[184] Koehler v. State, 519 P.2d 442 (Alas. 1974); Commonwealth v. Bartolomucci, 232 Pa. Super. Ct. 559, 335 A.2d 747 (1975).

[185] Koehler v. State, 519 P.2d 442, 449 (Alas. 1974). The situation in *Koehler* was particularly egregious in that the judge failed to contact either the defendant or his counsel before discharging the jury. The court's language suggested, however, that the judge's obligation to canvass a wide range of alternatives would have been applicable even if the defense had been present.

An analogous situation was presented in United States v. Gordy, 526 F.2d 631 (5th Cir. 1976). There a federal judge, pressured by a crowded docket and a scheduled sitting in another city, dismissed the jury without proof that their deadlock was permanent. The judge cut off defense objections by declaring, "I can make my plane if you will just get off my back long enough for me to do it." *Id.* at 634. Although the jury had made an unequivocal claim of deadlock on its own initiative, the Fifth Circuit held that retrial was barred.

Even on the most general level, decisions often shift erratically between close scrutiny of the trial judge's determination and complete deference to it. In fact, the *Perez* opinion approved both of these approaches simultaneously,[186] and subsequent cases, including the recent lower court rulings, have faithfully perpetuated this ambivalence. The notion that "manifest necessity" refers to any one "standard," even in terms of a basic threshold approach, is simply a myth.

Even less accurate than the concept of a single standard is the notion that the words "manifest necessity" serve any useful descriptive role. First, the "necessity" concept was never intended to be exclusive: *Perez* approved of mistrial when "there is a manifest necessity for the act, *or* the ends of public justice would otherwise be defeated."[187] Moreover, cases such as *Somerville* amply confirm that mistrial may be proper even when not strictly necessary. Conversely, mistrial may be *improper* and retrial barred even when termination of the proceedings is admittedly necessary. Such a result may occur when the prosecution deliberately creates irreparable prejudice to the defense[188] or finds itself unable to make out a prima facie case.[189] Finally, if the "necessity" concept is not always helpful, it need hardly be added that, whatever it means, it is seldom "manifest." In short, the "manifest necessity standard" is a traditionally sanctioned but nonetheless thoroughly deceptive misnomer, perhaps not rivaled even by the Holy Roman Empire.

If the "manifest necessity" formula provides no guidance for understanding mistrial decisions, may the decisions be explained by other standards? The answer appears to be no. In a few of the areas considered, one overall approach tends to predominate,[190] and conflicting decisions can be dismissed as aberrant or erroneous. But in most instances, no thread of consistency is discernible. The cases provide little guidance for resolving is-

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[186] *See* text accompanying notes 34-36 *supra*.

[187] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (emphasis supplied).

[188] *See* text accompanying notes 57 *supra* & 321-23 *infra*.

[189] *See* text accompanying notes 125-27 *supra*.

[190] The only areas in which this seems to be true are prosecutorial misconduct, text accompanying notes 134-37 *supra* (§ 5), and prejudice or error in the taking of testimony, text accompanying notes 138-44 *supra* (§ 6). Although the most recent decisions involving unpreparedness by the defense, text accompanying notes 145-50 *supra* (§ 7), and misconduct by the defense, text accompanying notes 151-55 *supra* (§ 8), do appear to be internally consistent, the prevalent view in the unpreparedness cases is difficult to reconcile with the very different attitude that prevails in the misconduct cases. *See* text accompanying notes 154-55 *supra*.

sues left open by *Somerville*; indeed, the recent decisions rarely offer useful commentary on the earlier cases or on the underlying double jeopardy interests.[191]

This problem is not attributable solely to the unlimited variety of circumstances in which mistrial questions arise. Even when faced with identical circumstances within the narrowest of categories, courts often adopt conflicting approaches. As noted above, some courts approve mistrials without seriously considering available alternatives, while others require a "scrupulous" search for alternatives and approve mistrials only when the need is compelling. A third group of courts holds mistrial improper in some situations even when no alternative is available.

These conflicts remain even if the analysis is refined to include the three other factors emphasized in Supreme Court decisions—the source of the trial difficulty, the potential for manipulation, and the identifiable prejudice to the defendant. Prejudice to the defendant rarely is shown, and even then some courts continue to apply a permissive standard.[192] Such decisions may be explained by the absence of a potential for manipulation or of an available alternative, but these elements themselves are far from self-defining. A potential for manipulation can be found in situations of illness, jury deadlock, or almost any other trial difficulty, including even situations in which the defendant's own misconduct precipitates the mistrial.[193] The availability of alternatives is likewise primarily a matter of degree. The determination of whether these elements are present may therefore turn largely on how closely the reviewing court examines the basis for the trial judge's determination. But if for some courts a potential for manipulation triggers strict examination of the al-

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[191] Statutory standards are similarly unhelpful. Many provide simply that mistrial is proper "only for reasons of manifest necessity," *e.g.*, PA. R. CRIM. P. 1118(b), or, for example, "when it is physically impossible to proceed with the trial in conformity with law," *e.g.*, N.Y. CRIM. PROC. LAW § 280.10(3) (McKinney 1971). The Model Penal Code likewise does not attempt statutory resolution of the issues that have divided the courts; it indicates only that retrial after mistrial is permissible, for example, if "prejudicial conduct . . . makes it impossible to proceed with the trial without injustice" or if "the jury is unable to agree upon a verdict." MODEL PENAL CODE § 1.08(4)(b)(3)-(4) (Proposed Official Draft 1962). *See also* NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 704(d)(ii) (1970).

[192] *See, e.g.*, United States v. White, 524 F.2d 1249 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2629 (1976) (additional charges added to the indictment prior to the second trial), *discussed in* text accompanying notes 145-47 *supra*; United States *ex rel.* Gibson v. Ziegele, 479 F.2d 773 (3d Cir.), *cert. denied*, 414 U.S. 1008 (1973) (loss of tactical advantage at the first trial).

[193] *See* text accompanying notes 119, 123, 149-50, 154 & 180 *supra*.

ternatives issue, for others the very availability of alternatives signals the potential for manipulation.[194] Under these circumstances, even an analysis that considers the four factors simultaneously seems hopelessly inadequate.

One possible reading of this situation is that no overall guidelines, no matter how complex, can prove satisfactory, and that confusing, contradictory decisions must be accepted as inevitable. Much of the difficulty, however, appears traceable to efforts by the courts to rely primarily on such elusive touchstones as the potential for manipulation or the availability of alternatives. In an attempt to avoid the problems engendered by this approach, the following sections undertake an evaluation of the interests affected by a mistrial decision and develop a framework within which the significance of these interests in particular cases can be better understood. Although the discussion may be viewed as a commentary upon the proper content of the "manifest necessity" standard, it is probably more useful to regard the analysis as one intended to provide a replacement for that artificial formulation.

III. Determining the Propriety of Retrial After Mistrial

A. *The Interests Affected*

Commentary upon the double jeopardy clause, both in the decisions and elsewhere, alludes to a number of important interests favoring or opposing reprosecution after mistrial. But reliable guidelines for reconciling the competing interests are rarely suggested; the stricter decisions tend simply to stress the importance of considerations opposing reprosecution, while the more permissive decisions emphasize the strength of the interests favoring retrial. The present section focuses attention upon each of these interests. It concludes that some of them ought to be disregarded altogether in mistrial cases, and that for those that remain, reliable benchmarks are usually available to indicate their importance in the particular case. On the basis of these conclusions, subsequent sections suggest a general framework for determining the propriety of retrial following mistrial, and apply the suggested approach to several specific mistrial problems.

[194] *See* text accompanying note 119 *supra*.

1. Interests Favoring Reprosecution

The considerations supporting retrial after a mistrial declaration in any given situation are of two kinds—first, those that justify a decision to terminate the proceedings in the first instance, and second, those that justify deference to the trial judge's initial decision by a court subsequently confronting a double jeopardy claim.

Many different factors may underlie the initial mistrial decision. Some of these, such as death or illness, are normally beyond mortal control. Others are perfectly avoidable in theory but nevertheless recur. Indictments may be served improperly, vital witnesses may not be served at all.[195] Jurors may obtain improper information by entering the courtroom after they supposedly have been excluded,[196] by remaining outside the courtroom when they were supposed to return,[197] or by simply asking the marshal for it directly.[198] Although prohibition of reprosecution in these situations might prevent some of this carelessness, much of it undoubtedly will occur in any event. The government's interest in obtaining one reasonable opportunity to establish the defendant's guilt therefore provides a strong impetus for permitting mistrial and a subsequent prosecution.

Interests favoring deference to the initial mistrial decision are of less force. Nonetheless, arguments grounded on the severe consequences of upholding a double jeopardy claim and on the proximity of trial judges to the events leading to mistrial have merit in some situations. A related argument based on considerations of federalism also has been advanced, but its relevance in double jeopardy cases is questionable.

The consequence of upholding a claim that mistrial was ordered improperly cannot be a new trial, because the defendant's challenge is precisely to the propriety of any further proceedings. As a result, error in declaring mistrial, unlike nearly all other trial errors, confers upon the defendant immunity from

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[195] *E.g.*, Downum v. United States, 372 U.S. 734 (1963) (witness not served); United States v. Alford, 516 F.2d 941 (5th Cir. 1975) (improperly served indictment).

[196] Whitfield v. Warden, 486 F.2d 1118 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974) (juror entered courtroom during argument on motions).

[197] United States v. Walden, 448 F.2d 925 (4th Cir. 1971), *vacated*, 458 F.2d 36 (4th Cir.), *cert. denied*, 409 U.S. 867 (1972) (juror observed defendant in handcuffs).

[198] Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (improper conversation with marshal); *cf.* Commonwealth v. Stewart, 456 Pa. 447, 317 A.2d 616 (1974) (the tipstaff—the court official charged with safeguarding the jury—was the father of the victim); Commonwealth v. Bromage, 73 Lack. J. 131 (Pa. C.P. 1972) (defendant conversed with a juror during recess).

punishment for the crimes at issue. This consideration undoubtedly explains the visible reluctance of courts to second-guess the initial mistrial ruling when considering double jeopardy claims.[199] Any mistrial guidelines, if they are to be workable, must accept this reluctance as a fact of life, just as the doctrine permitting retrial after reversal of a conviction has been framed partly in response to similar attitudes.[200] And this hindsight problem reflects concerns that probably should be regarded as legitimate, at least in some cases. Even though a court confronting a double jeopardy claim might have resolved the mistrial problem differently in the first instance, the court properly can weigh its confidence in the validity of its own view—or the relative advantages of its approach—against the costs imposed by reversal. These costs are particularly substantial when the defendant has been convicted in a retrial that was scrupulously fair, and when the reprosecution has not caused any specifically identifiable prejudice to the defendant. In cases of this kind, when the trial judge's ruling, however erroneous, appears to have been reached in good faith, there will be a legitimate basis for some degree of deference to that determination.

The second reason for deference—that the trial judge is better able to determine the need for mistrial because of his or her proximity to the events—was advanced repeatedly in the earlier cases[201] and has continued to appear in recent lower court decisions, notably in the hung-jury context.[202] Yet, in many of these cases, the matters in issue did not turn on direct familiarity with the "heated atmosphere" of the particular trial; deference was therefore wholly inappropriate. Moreover, the proximity notion retains only partial validity even in cases requiring an assessment of the impact of prejudicial comments or the usefulness of a cautionary instruction to cure them. If comments are prejudicial to the prosecution, the trial judge plainly cannot be guided solely by the solutions proposed by the defendant, and some deference may be justified when mistrial is ordered over defense objections. If the event seems prejudicial to the accused, but the defense does not affirmatively seek mistrial, *Gori* and its

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[199] *See, e.g.*, text accompanying notes 113-14, 146-47 & 168-74 *supra*.

[200] United States v. Tateo, 377 U.S. 463, 466 (1964).

[201] *See, e.g.*, Gori v. United States, 367 U.S. 364 (1961); *cf.* Wade v. Hunter, 336 U.S. 684, 692 (1949) (court martial in battle zone presented "extraordinary reasons" for deference to judgment of the commanding general).

[202] *See* text accompanying notes 168-74 *supra*.

progeny[203] suggest the need for special deference to the trial judge so that he or she will not be discouraged from vigilant protection of the defendant. This concern, however, is wholly misplaced. Defense counsel is as well situated as the judge to assess the impact of incidents that are potentially prejudicial to the accused. The usefulness of mistrial to the defense depends, moreover, not only on the impact of the particular event but also on two other factors—the nature of other circumstances that may have helped or hindered the defendant's cause, and the extent to which the resources of the accused will permit an adequate defense in a second trial.[204] A trial judge normally will have only vague familiarity with the first of these factors and none at all with the second. Deference to the trial judge therefore seems particularly inappropriate when the mistrial decision ostensibly was intended to protect an accused who objected to mistrial or was given no opportunity to do so. In such a case, there is no excuse for not ascertaining defense preferences directly and then honoring them.

Finally, the Supreme Court has suggested that considerations of federalism provide an important reason for deferring to state decisions permitting retrial after mistrial, once these decisions have been upheld in the state appellate system.[205] Because *Benton v. Maryland*[206] requires the validity of every state mistrial decision to be tested by the same double jeopardy standards applicable in federal courts, the Court has stressed the need to make constitutional requirements sufficiently flexible to be workable in diverse procedural systems.

This concept of flexibility is sound enough in principle, but mistrial standards are in any event so flexible that special consideration of this factor is inappropriate. In the usual mistrial case, the Court is not called upon to approve a single rule of pleading for all state and federal courts, but rather to determine the validity of an application of a state rule under particular circumstances. Despite the incorporation into the fourteenth amendment of the "specifics" of the double jeopardy clause, the question presented under the federal standard of "manifest

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[203] *See* text accompanying notes 136-37, 143-44 & 172-74 *supra*.

[204] Similarly, a defendant unable to obtain pretrial release might prefer to complete the first trial in order to avoid extending the period of incarceration prior to the eventual verdict. *Cf.* McGinnis v. Royster, 410 U.S. 263 (1973) (state may deny "good time" credit for time served in custody prior to sentencing).

[205] Illinois v. Somerville, 410 U.S. 458, 468-69 (1973).

[206] 395 U.S. 784 (1969).

necessity" is therefore scarcely different from the one that had been posed in review of state court decisions prior to *Benton*: whether the mistrial was essentially unfair under the "totality" of the circumstances. In this context, evaluation of the constitutional claim requires an inevitably flexible determination, but the Court has instead occasionally invoked the federalism concept as a basis for simply accepting at face value the consequences of state practice, no matter how outmoded or technical.[207] This result cannot be justified by the Court's traditional and proper reluctance to impose rigid limitations upon procedure in the fifty states. Considerations of federalism notwithstanding, federal courts considering double jeopardy claims should not hesitate to assess fully the actual impact of local rules in the context of the particular case.

2. Interests Opposing Reprosecution

The interests at the heart of the double jeopardy clause were well summarized by Mr. Justice Black in *Green v. United States*:[208]

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[209]

For the purpose of assessing the force of these interrelated considerations, it will be useful to focus attention upon two separate

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[207] For example, in Duncan v. Tennessee, 405 U.S. 127 (1972), a robbery trial had been aborted because the state's proof showed that the defendant had used a "22 rifle," not the "pistol" alleged in the indictment. The defendant was later prosecuted on a corrected indictment, and the state courts upheld the conviction—not on the theory that there was "manifest necessity" to terminate the first trial but rather on the theory that the second trial was not for precisely the same offense. State v. Brooks, 224 Tenn. 712, 715, 462 S.W.2d 491, 493 (1970). After argument, the Supreme Court dismissed certiorari as improvidently granted, assigning as a reason that the double jeopardy issues were excessively intertwined "with rules of criminal pleading peculiar to the State of Tennessee." 405 U.S. at 127. This view of the problem seems to ignore, or treat as inappropriate for Supreme Court consideration, the question whether the *impact* of the state's rules of procedure, under all the circumstances, poses a serious threat to double jeopardy interests. *See also* Illinois v. Somerville, 410 U.S. 458, 468 (1973).

[208] 355 U.S. 184 (1957).

[209] *Id.* at 187-88.

notions alluded to by Mr. Justice Black. The first notion is that reprosecution is undesirable because it subjects the defendant to serious burdens even if the defendant is acquitted at retrial. Among these harms are the delay, strain, and expense associated with retrial. The second notion is that reprosecution is dangerous because it actually enhances the likelihood of conviction. In particular, retrial encroaches upon the defense's special interest in preserving a potentially favorable tribunal.

a. *Delay*

Mistrial opinions often include the delay resulting from mistrial among the hazards to be prevented by double jeopardy safeguards.[210] This delay may impede the preparation of the defendant's case and thereby increase the likelihood of conviction. But even in the absence of this danger, mistrial prolongs the period during which a defendant is subject to "embarrassment, . . . anxiety and insecurity." It may also extend the period of a defendant's incarceration prior to sentencing.[211] Whether or not the prosecution delays the proceedings deliberately, to subject the defendant to these burdens, the defendant's interest in eliminating or minimizing these harms is great.

Unfortunately, limitations upon reprosecution after mistrial can contribute little to protecting defendants against delay. Most delay occurs in the course of pretrial proceedings, before jeopardy is deemed to attach. And once the trial begins, further delay may be occasioned by continuances, which are almost never held to violate double jeopardy restrictions, even after postponements of one month or longer.[212] Indeed, decisions

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[210] *See, e.g.*, Illinois v. Somerville, 410 U.S. 458, 469 (1973); *id.* at 472 (White, J., dissenting); United States v. Jorn, 400 U.S. 470, 479 (1971) (Harlan, J.); Downum v. United States, 372 U.S. 734, 739 n.* (1963) (Clark, J., dissenting).

[211] *See* note 204 *supra*.

[212] *See, e.g.*, United States v. Cummings, 507 F.2d 324 (8th Cir. 1974) (seven-week delay to allow prosecutor to prepare rebuttal testimony); People v. Clemmons, 208 Cal. App. 2d 696, 25 Cal. Rptr. 467 (1962) (one-month delay until victim-witness, previously held in contempt, finally agreed to testify). The Supreme Court likewise has assumed that the double jeopardy clause normally does not bar a continuance, even when the delay affords the prosecution an opportunity to strengthen its case. *See* Williams v. Florida, 399 U.S. 78, 85-86 (1970). *See also* note 81 *supra*. This assumption is sound because the continuance, though enabling the government to strengthen its case, preserves the original tribunal and the testimonial content of the trial. Double jeopardy claims therefore are inapposite, although other problems may be involved.

For an unusual situation involving a double jeopardy violation as a result of a continuance, see State v. O'Keefe, 135 N.J. Super. 430, 440, 343 A.2d 509, 515 (Union County Ct. 1975) (continuance should not bar resumption of trial "unless [as here] the

often hold mistrial improper precisely because the judge did not deal with a trial problem by ordering a continuance.[213] Thus, double jeopardy doctrine is not, and probably never could be, useful for ensuring prompt disposition of the case. The constitutional right to a speedy trial provides the natural framework within which this problem can be addressed. In addition to its important role in preventing delay prior to trial, the right to a speedy trial is available to limit continuances during trial,[214] and it has been the basis for a number of decisions barring reprosecution on account of undue delay following mistrial.[215]

b. *Other Burdens of Importance Irrespective of Effect on Outcome*

A second prosecution will expose the accused again to the personal strain of trial. It also will result in substantial additional expense, at least for a nonindigent defendant; indeed, one recent case chronicles the defendant's transition from retained to appointed counsel over the course of four trials on the same charges.[216] The strain and expense of retrial are particularly troublesome when they hamper the defendant's chances for acquittal, or when they result from deliberate harassment by the

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neglect [by the prosecutor] is inexcusable and the continuance is an unreasonable break in the continuity of the trial"); *cf.* People v. Golden, 55 Cal. 2d 358, 370, 359 P.2d 448, 454, 11 Cal. Rptr. 80, 86 (1961) (en banc) (four-day continuance not improper in itself, but combined with questionable conduct by prosecutor, required reversal).

[213] *See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971) (Harlan, J.); United States v. Kin Ping Cheung, 485 F.2d 689 (5th Cir. 1973).

[214] Speedy trial requirements do not cease merely because trial has begun; the reasonableness of midtrial delay still must be tested by speedy trial standards. *See* United States v. Cummings, 507 F.2d 324, 330 (8th Cir. 1974); United States v. Morse, 491 F.2d 149, 156-57 (1st Cir. 1974).

[215] *E.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (indefinite delay); United States v. Lombardo, 378 F. Supp. 727 (W.D.N.Y. 1974) (two-year delay); United States v. McWilliams, 69 F. Supp. 812 (D.D.C. 1946), *aff'd*, 163 F.2d 695 (D.C. Cir. 1947) (two-year delay).

For cases finding no speedy-trial violation in spite of significant delay between the mistrial and the start of the retrial, see United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974) (ten-month delay); Wright v. Boles, 275 F. Supp. 571 (N.D.W. Va. 1967) (five-month delay); United States v. Gladding, 265 F. Supp. 850 (S.D.N.Y. 1966) (four-year delay). Constitutional standards for speedy trial thus are vague and unsatisfactory, *see* Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972), and statutory requirements cure by no means all of these defects, *see, e.g.*, Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (Supp. V 1975). If speedy-trial standards are inadequate, however, it is primarily because of a clash of interests as difficult to reconcile as those present in the mistrial context itself. The speedy-trial framework remains the appropriate context within which to resolve these problems.

[216] Carsey v. United States, 392 F.2d 810, 813 (D.C. Cir. 1967). The first two trials ended in hung juries, and a mistrial was declared in the third on the basis of improper remarks by defense counsel in his closing statement. The fourth trial ended in a conviction, which was set aside when the court held the third mistrial improper.

prosecution. Repeated trials may in fact be used as an effective means of punishment even if a conviction never is obtained. But even apart from these dangers, repeated trials can constitute a severe imposition upon the accused, and mistrial decisions often have recognized the importance of protecting the defendant against this burden.[217]

Neither the strain and expense suffered by the accused nor the danger of prosecutorial harassment can be wholly controlled by limitations upon mistrial. A prosecutor determined to make life difficult for a defendant can produce indictments repeatedly and require extensive pretrial defense efforts without ever raising a double jeopardy problem.[218] Moreover, the prosecutor can bring the defendant to trial, time and again, on technically different charges built upon the same underlying offense.[219] And even in the absence of governmental bad faith, the defendant can be forced to bear the strain of repeated trials following conviction and reversal.[220]

Yet the need for double jeopardy protection against the burdens of retrial remains great in view of the almost complete absence of any other workable safeguards. Deliberate governmental misconduct may provide the basis for a general due process challenge to the prosecution,[221] but claims of this kind are very difficult to prove,[222] and even when successful they serve only to quash the conviction, not to redress the injury suffered from the fact of prosecution itself. Nor can the accused obtain relief in a civil suit, even after prosecutorial misconduct has been proved in the criminal proceedings. In most jurisdictions, prosecutors enjoy abso-

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[217] *E.g.*, Illinois v. Somerville, 410 U.S. 458, 472 (1973) (White, J., dissenting); United States v. Jorn, 400 U.S. 470, 479, 483 (1971) (Harlan, J.).

[218] *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 357-59 (1956). For a particularly egregious example, see United States v. Lattimore, 215 F.2d 847 (D.C. Cir. 1954), *discussed in* Comment, *supra* at 358 n.88. This kind of abuse theoretically might be prevented by the grand jury's power to refuse to return a true bill, but in practice the grand jury is normally little more than a "rubber stamp." *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1169-72 (1960).

[219] *See* text accompanying notes 23-24 *supra*. This power is restrained to a limited extent by the collateral estoppel doctrine. *See* note 24 *supra*. Some states have required the joinder of "related offenses" as a matter of state law. *E.g.*, Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (1974). *See generally* MODEL PENAL CODE §§ 1.07(2)-(3), .09(1) (Proposed Official Draft 1962); ABA STANDARDS RELATING TO JOINDER AND SEVERANCE §§ 1.1, .3 (1968).

[220] *See* text accompanying notes 28-30 *supra*.

[221] *E.g.*, Brady v. Maryland, 373 U.S. 83 (1963).

[222] *See, e.g.*, United States v. Acosta, 526 F.2d 670 (5th Cir.), *cert. denied*, 96 S. Ct. 2625 (1976).

lute immunity from damage claims of this kind,[223] and the same immunity will defeat any suit against the prosecutor under the 1871 Civil Rights Act[224] for intentional deprivation of constitutional rights.[225] Accordingly, the burdens that retrial imposes upon the accused and the danger that prosecutorial action may have been designed deliberately to impose these burdens deserve a prominent place in any calculus of the propriety of mistrial. The importance of these concerns may be relatively limited when the proceedings are aborted at a very early stage, but they will assume great weight when a mistrial difficulty arises after the first trial nearly has run its course.

c. *Preserving a Favorable Tribunal*

The mistrial decisions frequently stress the importance of the defendant's interest in completing the trial before a tribunal

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[223] *See, e.g.*, McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969) (en banc); Polidor v. Mahady, 130 Vt. 173, 287 A.2d 841 (1972). *Contra*, Cashen v. Spann, 66 N.J. 541, 334 A.2d 8, *cert. denied*, 423 U.S. 829 (1975). As a general rule, the municipality that employs an allegedly errant prosecutor also enjoys absolute immunity. *E.g.*, Zimmerman v. City of New York, 52 Misc. 2d 797, 276 N.Y.S.2d 711 (Sup. Ct. 1966). *Contra*, Orso v. City & County of Honolulu, 56 Haw. 241, 534 P.2d 489 (1975).

[224] 42 U.S.C. § 1983 (1970).

[225] Imbler v. Pachtman, 424 U.S. 409, 424 (1976); *cf.* Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976) (federal prosecutor enjoys absolute immunity in suit under 42 U.S.C. §§ 1985(2), 1986 (1970)). Other forms of relief likewise may be difficult to invoke. An injunction is a possibility if deliberate prosecutorial harassment can be proved. *Compare* HMH Publishing Co. v. Garrett, 151 F. Supp. 903 (N.D. Ind. 1957), *with* Younger v. Harris, 401 U.S. 37 (1971). Professional censure may be available in extreme cases. *See generally* Lusk v. Hanrahan, 244 F. Supp. 539, 540 (E.D. Ill. 1965). Prosecutors might in theory be subject to criminal prosecution. In practice, however, the available means for deterring prosecutorial harassment and for compensating its victims are limited indeed.

Relief might be provided in a more straightforward and less irritating form simply by authorizing an acquitted defendant to recover certain costs like other successful litigants. But very few states authorize this form of compensation, or provide even the more limited remedy of financial relief for the defendant forced to undergo reprosecution after a necessary mistrial. *See, e.g.*, United States v. Barker, 15 U.S. 186, 2 Wheat. 395 (1817); People v. Lavan, 53 Mich. App. 220, 218 N.W.2d 797 (1974). *But see* COLO. REV. STAT. § 16-18-101 (1973); FLA. STAT. ANN. §§ 939.06-.07 (1973); 19 PA. STAT. ANN. §§ 1221, 1223, 1230 (1964); *cf.* United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967) (county must reimburse individuals who have been prosecuted in violation of 42 U.S.C. § 1971(b) (1970) for their costs, including reasonable attorneys' fees incurred in defense of the state prosecutions). Compensation for the additional expense of retrial would make good sense, but it would not meet the most important objections to mistrial. *See* text accompanying notes 226-40 *infra*. In any event, there seems to be little likelihood of its adoption; indeed, the prevailing rules are quite the reverse, because a *convicted* defendant quite commonly is compelled to pay costs. *See* Annot., 65 A.L.R.2d 854 (1959); *cf.* Fuller v. Oregon, 417 U.S. 40 (1974) (requirement that convicted defendants who were indigent at time of their prosecution, but who later acquired means to pay, repay their legal defense does not violate the equal protection clause). Adding insult to injury, these costs may include the expense of an earlier prosecution that ended

that may be favorably disposed to his or her case.[226] This consideration has little applicability to trials before a judge, because frequently the same judge will be assigned to hear the case upon reprosecution. In jury trials, however, selection of the panel can be of great importance, and on many occasions, counsel may have strong suspicions that the jury chosen will tend to favor the defense, either because of past experience with jurors of similar background or perhaps simply because the lawyer personally "likes" the jurors.[227] Mistrial on such occasions will be particularly disappointing to the defense, and there may even be some danger that the prosecution might deliberately seek to abort the trial if it likewise regards the jury as especially favorable to the accused.

Given the importance of the defendant's interest in preserving a potentially favorable tribunal, it is surprising that double jeopardy doctrine is so ill-suited to protecting that interest. The settled rule is that jeopardy attaches in a jury trial when the jury is sworn—not earlier or later.[228] This rule means that retrial may be barred if the trial is aborted before any evidence is presented, a result that scarcely would be comprehensi-

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in mistrial. *See, e.g.*, United States v. Murphy, 59 F.2d 734 (S.D. Ala. 1932); Hill v. State, 21 Ala. App. 310, 107 So. 789 (1926).

[226] *See, e.g.*, Illinois v. Somerville, 410 U.S. 458, 472-73 (1973) (White, J., dissenting); United States v. Jorn, 400 U.S. 470, 480 (1971) (Harlan, J.); Downum v. United States, 372 U.S. 734, 736 (1963).

[227] *See, e.g.*, 2 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 340 (1971); J. KAPLAN & J. WALTZ, THE TRIAL OF JACK RUBY 105 (1965). Apparently, it is becoming more common for such expectations to be reinforced by systematic investigation of individuals included in the jury venire and by the use of social science research to predict attitudes toward the case likely to be held by particular social, religious, or age groups. *See* Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968); Kahn, *Picking Peers: Social Scientists' Role in Selection of Juries Sparks Legal Debate*, Wall St. J., Aug. 12, 1974, at 1, col. 1.

[228] Cases cited note 14 *supra*. The rule apparently is traceable to the old doctrine that except in cases of "evident necessity" the trial judge has no authority to discharge the jury once the case is committed to its jurisdiction, which occurs when the jury is sworn. *See* note 8 *supra*. In cases finding no violation of the double jeopardy clause, courts have sometimes said that jeopardy did not attach, even in midtrial, because the mistrial was properly declared. *See, e.g.*, Himmelfarb v. United States, 175 F.2d 924, 932 n.2 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949). This usage does not, of course, affect the result, but it does promote confusion. The Supreme Court therefore has "found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.'" Serfass v. United States, 420 U.S. 377, 388 (1975). The conclusion that "jeopardy has attached," therefore, serves only to trigger the double jeopardy analysis. Breed v. Jones, 421 U.S. 519, 531-32 (1975); United States v. Jorn, 400 U.S. 470, 480 (1971) (Harlan, J.).

ble but for the interest in preserving the first tribunal.[229] But the traditional rule also means that the trial may be aborted before the jury is formally sworn without any double jeopardy restriction whatsoever. In numerous cases, proceedings are aborted on grounds that would not constitute "manifest necessity" after most or all of the jurors have been selected tentatively; double jeopardy claims are rejected on the sole ground that jeopardy has not attached.[230] The prosecution therefore can avoid the consequences of poor luck at the voir dire, as long as it thinks to act before the jurors take their oath.

In view of this loophole, consistency would seem to require either abandoning all effort to safeguard the defendant's interest in a favorably disposed tribunal, or shifting the point at which jeopardy is deemed to attach. I will consider this matter shortly, when I turn to formulating a general framework for determining the propriety of mistrials.[231] For present purposes, it suffices to note that unlike the other factors considered thus far, the interest in a favorable tribunal—when it is present at all—arises at the earliest stage of the trial and retains its force throughout.

In what kinds of situations, however, is this interest genuinely present? In a great many cases, the jury may harbor unusually strong sympathies for the accused—or for that matter, for the prosecution. But normally no indication of such sympathies can be detected until the verdict is rendered, and frequently not even then. In such cases, termination of the trial before verdict may deprive the defendant of a favorably disposed tribunal, but it may, for all anyone can know, relieve the

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[229] Indeed, before Benton v. Maryland, 395 U.S. 784 (1969), some states provided that jeopardy did not attach in either jury or nonjury cases until evidence was presented. *E.g.*, People v. Willingham, 52 Misc. 2d 1067, 277 N.Y.S.2d 778 (Sup. Ct. 1967). The American Law Institute similarly proposed that the presentation of evidence be recognized as the triggering event, in order to eliminate the apparent inconsistency in the treatment of jury and nonjury cases. *See* text accompanying note 250 *infra*.

[230] *E.g.*, People v. Smylie, 217 Cal. App. 2d 118, 31 Cal. Rptr. 360 (1963); People v. Scott, 40 App. Div. 2d 933, 337 N.Y.S.2d 640 (1972); State v. Buck, 239 Or. 577, 398 P.2d 176 (1965); *cf.* Bounds v. State, 271 So. 2d 435 (Miss. 1973) (testimony had opened without the jury being properly sworn). The Sixth Circuit recently provided a vivid illustration of the operation of this rule. After a jury had been selected and seated, the prosecutor discovered that certain evidence was unavailable, and a mistrial was declared. After retrial, the court of appeals upheld a double jeopardy claim, but the government's petition for rehearing disclosed that the first jury, though selected, had never been sworn. This, of course, made the case altogether different; the court vacated its earlier opinion and held retrial permissible. United States v. Whitman, 480 F.2d 1028 (6th Cir.), *cert. denied*, 414 U.S. 1026 (1973).

[231] *See* text accompanying notes 248-57 *infra*.

accused of an unusually hostile panel and permit selection of a better jury upon retrial. A defendant's preference for retaining the first tribunal accordingly embodies an interest that is unusually speculative and difficult to assess. The interest should not be simply disregarded for that reason; the perceived fairness of the trial process depends in significant part upon the protection afforded a defendant's subjective and perhaps wholly unfounded preference for the jury he or she has helped to select.[232] But the likelihood that mistrial in fact will force the defendant to face a less favorable jury upon retrial normally will be too slim or imponderable to weigh heavily in the mistrial decision.

There may be unusual cases in which the defendant's interest in preserving the first tribunal will be more concrete and compelling. The defense might be able to establish, for example, that the social or racial background of the jurors was unusual for the jurisdiction and that substantial grounds existed for expecting a jury of such background to be more sympathetic to the accused than a more typically composed panel.[233] A court could not, of course, meaningfully determine on this basis whether the jurors *were* favorably disposed to the defense, and it has been considered unseemly for judges to attempt to do so.[234] But in cases of this kind, in which the defense can point to a concrete foundation for its desire to retain the original jury, the defendant's interest in completing the trial before the first tribunal at least would be entitled to considerably greater weight in the double jeopardy analysis.

d. *Preserving Other Prospects for a Favorable Outcome*

If the prosecution could abort a trial whenever it was displeased with the presentation of its own case or with the strength of the accused's defense, the possibilities for convicting a truly innocent defendant would be increased immeasurably. Even

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[232] *See* Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975).

[233] Merely establishing, for example, that a black defendant faced a heavily black jury would not be sufficient for this purpose; indeed, defense attorneys often suspect that black, middle-class jurors may be biased *against* young, alienated black defendants. *See, e.g., id.* 553-54 n.30 (discussing Zimroth, *How They Picked the Panther 21 Jury*, JURIS DOCTOR, July-Aug. 1974, at 40). As a result, a showing of the kind suggested in the text presumably would require establishing some substantial link between the specific subject matter of the case and the likely attitudes of the group in question. No doubt such a showing seldom can be made persuasively, but leaving open the possibility is preferable to excluding from double jeopardy analysis all examination of this type of prejudice to the defense.

[234] *Id.* 553-54.

when the accused somehow is "known" to be guilty, it has been considered fundamentally unfair to destroy the defendant's prospects for an acquittal in the first trial solely in order to provide "the State with all its resources and power"[235] a fresh opportunity to obtain a conviction.[236]

The premise of these notions is far from invulnerable. Burgeoning caseloads and constricted budgets in the prosecutor's office, combined with the expansion over the past two decades of protection for the accused, have prompted many observers to regard fears of an all-powerful state as largely anachronistic.[237] On the other hand, relaxation of old technicalities of pleading and proof may have provided the government with advantages far more significant in operation than the more highly publicized new safeguards for the defendant.[238] Although it is impossible to estimate with any precision the general balance of advantage between prosecution and defense, governmental power is undoubtedly awesome when *selectively* employed. Indeed, the potential for abuse in any one case remains virtually unlimited. Therefore, it is appropriate to attribute as much importance as ever to the historic policy of redressing at least part of the potential imbalance of resources by safeguarding any prospects for acquittal that the defendant may have gained in the course of the first trial.

The defendant's prospects for acquittal may grow dimmer upon retrial for a variety of reasons. First, the prosecution may have suffered a tactical setback in the initial proceeding that it can remedy in a retrial. Tactical setbacks often will be dramatic and obvious—a key witness may refuse to testify, give startlingly exculpatory evidence, or retract testimony upon cross-examination. Yet often only the prosecution will be aware of its difficulties—it may, for example, fail to elicit from one witness proof that no other witness can supply. For the time being, the defense may be wholly unaware that the state's case is fatally flawed.

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[235] Green v. United States, 355 U.S. 184, 187 (1957).

[236] United States v. Jorn, 400 U.S. 470, 479 (1971) (Harlan, J.); Gori v. United States, 367 U.S. 364, 372 (1961) (Douglas, J., dissenting); Brock v. North Carolina, 344 U.S. 424, 440-42 (1953) (Douglas, J., dissenting).

[237] *E.g.*, PRES. COMM'N ON LAW ENFORCEMENT & THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 303-08 (1967) (additional views of Leon Jaworski, Ross Malone, Lewis Powell, Jr. & Robert Storey); Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 A.B.A.J. 840 (1963). The theme is not a new one. *See, e.g.*, United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.).

[238] Goldstein, *supra* note 218.

These possibilities for tactical setback to the prosecution suggest that nearly any mistrial could increase the likelihood of conviction upon retrial. The danger, of course, will be minimal in the period before evidence is taken: opening statements rarely, if ever, will be so persuasive or so ineffective as to have an important impact on the verdict. After testimony begins, however, the danger is ever present. Even when no prejudice to the prosecution is apparent, double jeopardy rules must take account of the possibility that the prosecution privately entertains serious concern for the success of its case.

Retrial may involve an increased likelihood of conviction for a second reason, unrelated to the possibility of tactical setbacks to the prosecution in the initial trial. The government may be aided upon retrial merely by having observed defense counsel's tactics on cross-examination or by having learned the nature of any substantive defense. These possibilities are particularly important because, despite recent trends toward the liberalization of discovery in criminal cases, the prosecution generally lacks the opportunity to learn much prior to trial about defense tactics or the witnesses the accused will present.[239] An aborted first trial therefore provides the prosecution with general insight into defense strategy that may be useful in preparing for retrial, an advantage frequently not offset in practice by the reciprocal revelation of prosecution strategy to the defense.[240]

The importance of the "discovery" advantages associated with mistrial depends in part upon the point during the first trial at which the proceedings are aborted. In unusual cases, the prosecution might obtain valuable insight into defense strategy from its opening statement, but normally no meaningful advantages can be gained before the beginning of testimony. And discovery advantages probably remain relatively insignificant

[239] *See, e.g.*, FED. R. CRIM. P. 16(b). Relatively few states seem to allow the sweeping discovery against the defendant recommended in ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL §§ 3.1-.3 (Tent. Draft 1969) (approved 1970). A defendant may, however, be required to give advance notice of intention to raise an alibi or insanity defense and to provide a list of the witnesses to be called in that connection. *E.g.*, FED. R. CRIM. P. 12.1, .2; *see* Williams v. Florida, 399 U.S. 78, 82, 86 (1970); Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 637-42.

[240] Although the defendant's formal discovery rights are normally as limited as are those of the prosecution, the defense often can use the preliminary hearing and the bill of particulars as indirect means for requiring pretrial disclosure of the government's witnesses and trial strategy. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 129 (1969). The revelation of this kind of information at trial is therefore likely to be comparatively less significant for the defense than it will be for the prosecution.

throughout the presentation of the government's case-in-chief. The prosecutor may be aided by insight into general defense tactics on cross-examination, but the knowledge concerning prosecution strategy gained by the defense ordinarily will be of equivalent or even greater value at this stage. Discovery, therefore, will become truly significant for the government only when the accused begins the presentation of his or her defense.

B. *When Are Double Jeopardy Interests in Jeopardy?*

It is scarcely possible to catalogue with precision and economy the circumstances in which declaration of mistrial should be considered improper. The mistrial problem has proved intractable precisely because important factors both favoring and opposing mistrial are almost always present simultaneously. A rather unstructured balancing approach emerges in some of the cases as a possible response to this situation. But the very open-endedness of the balancing approach renders it unresponsive to some of the most important considerations—the defendant's need for reliable safeguards and the government's interest in preventing immunization from prosecution as a result of the unpredictable hindsight of a reviewing court.

The foregoing analysis of the underlying interests suggests a way of avoiding this dilemma. Some of the interests traditionally asserted should be disregarded completely in assessing the propriety of mistrial;[241] the stage of trial is a key determinant of the importance of those interests that remain. The stage of trial thus provides a useful guide for determining whether stringent or more flexible safeguards will provide the suitable degree of protection for those interests. This section reviews the relative strength of the interests implicated at each stage of the trial and serves as the basis for an analysis of the double jeopardy safeguards appropriate at each stage.

1. Before the Beginning of Testimony

Until testimony opens, the defendant's interest in avoiding reprosecution ordinarily will be rather weak. The danger of prosecutorial manipulation to avoid the impact of tactical difficulties

[241] These include the defendant's interest in avoiding delay, *see* text accompanying notes 212-15 *supra*, the state's interest in promoting deference to the trial judge who acts ostensibly for the benefit of the defense, *see* text accompanying notes 203-04 *supra*, and the state's interest in maintaining flexibility on grounds of federalism, *see* text accompanying notes 205-07 *supra*.

in presenting the government's case is essentially nonexistent because presentation of the case has yet to begin. Retrial will require some duplication of defense efforts to prepare its case and to ready its witnesses, but the additional burden of having to undertake a second defense will nevertheless be relatively minor at this stage, unless selection of the jury has been unusually difficult, time-consuming, or expensive.

The only factor of importance, indeed the one consideration that justifies the attachment of jeopardy before testimony begins, is the defendant's interest in presenting his or her case to a tribunal that may be favorably disposed to the defense. This interest is entitled to special weight, however, only in those rare cases in which a concrete basis exists for believing that the particular jury might be unusually sympathetic to the defense.[242]

The government's interest in reprosecuting may have particular legitimacy in the period before testimony begins. This seems to be the time when defects in the indictment often are discovered and failure to serve subpoenas is revealed. There is of course no reason why such problems could not be cured before the trial begins, and good prosecutors certainly will endeavor to attend to them. But error and even incompetence are in some measure inevitable. Whether or not their incidence could be reduced by adding a draconian double jeopardy sanction to others that may be at work,[243] granting immunity to a defendant in order to promote more efficient prosecutorial performance is inappropriate in the absence of danger to the defendant's own legitimate interests.

These considerations suggest that although some protection against mistrial is necessary before testimony begins, a relatively flexible approach ordinarily will be appropriate because the defendant's double jeopardy interests will be limited. More stringent safeguards become justified, however, if the jury selection process has been unusually difficult or if the panel chosen shows signs of being unusually favorable to the defense.

2. From the Beginning of Testimony to the Close of the Prosecutor's Case-in-Chief

As soon as the taking of evidence begins, mistrial involves a radically increased potential for prejudice to the defendant.

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[242] *See* text accompanying notes 232-34 *supra*.

[243] Independent of their effect on the defendant, errors of this kind inconvenience both the court and the prosecutor's office; professional pressure, therefore, may sanction those responsible for the errors and deter neglect.

More time and effort are then expended, strategies of cross-examination may be revealed, and the prosecution may make unpleasant discoveries about weaknesses in its own case. Some of these factors, moreover, may not be readily apparent in the way that a lengthy voir dire might be. A tactical setback to the prosecution may occur without defense counsel's even suspecting the problem; even if it is suspected, it may be impossible to prove.[244] Under these circumstances, mistrial exposes a defendant not only to the burden of retrial and the possible loss of a favorably disposed tribunal, but also to the possibility that the government will improve the strength of its case significantly in the second prosecution.

These considerations call for particularly stringent safeguards whenever difficulty in continuing the trial is traceable to the fault or even excusable error of the prosecution. Here the possibility that the difficulty was caused deliberately almost always will be present. In any event, the defendant will face the considerable burden of retrial because of an error whose consequences are more fairly placed on the party responsible for it.

The need for stringent protection is lessened considerably when difficulty arises because of events wholly outside the control of the prosecution, such as death or illness of participants in the trial. In such situations, the nature of the event assures that mistrial has not been induced by a prosecutor seeking to avoid the effects of some subtle tactical setback or hoping to gain some other opportunity for strengthening the government's case upon retrial. The danger remains, however, that the judge, in choosing among alternatives, may be influenced by his or her sense of the advantages of giving the prosecutor a second chance. As a result, stringent safeguards are necessary, at least when the course of the first trial has produced an evident tactical advantage for the defendant.

Suppose, however, that a witness becomes ill during presentation of the prosecutor's case, and, for all that appears, none of the testimony has proved particularly harmful to the prosecution. Do the strictest limits upon mistrial remain appropriate? The government may have suffered a setback apparent only to someone privy to prosecution strategy, or the prosecutor may simply have a sense that the case has gone badly, but the prosecutor has not caused the difficulty. The judge in turn is in a poor position to have a reliable sense of these less tangible fac-

[244] *See* text accompanying notes 238-39 *supra*.

tors. Under these circumstances, the possibilities for prosecutorial or judicial manipulation seem relatively remote. Retrial does, of course, represent a significant burden for the defense, even in the absence of specific, identifiable prejudice; some restrictions upon mistrial therefore are necessary. But the appropriate limitations should reflect the fact that in this context the vast majority of mistrial determinations can be presumed to have been made by trial judges in good faith.

In the period between the beginning of testimony and the close of the prosecution's case, the strictest safeguards thus appear necessary whenever voir dire has been unusually difficult, a concrete basis exists for considering the jury unusually favorable to the defense, the prosecution is responsible for creating the mistrial problem, or retrial would relieve the prosecution of some identifiable tactical disadvantage. A more flexible approach seems appropriate when none of these factors is present; that is, when jury selection has not been extraordinary, when the difficulty prompting mistrial arises from causes beyond the control of the prosecution, *and* when the prosecution has suffered no apparent disadvantage during the first trial.

3. After the Close of the Prosecutor's Case-in-Chief

Once the prosecution rests, the interests favoring declaration of mistrial over the defendant's objection become considerably weaker. At this stage, proceeding to verdict normally will involve comparatively little inconvenience or unfair strategic disadvantage for the prosecution. If the defense decides not to offer any evidence, the trial will in essence be over. If a defense is offered, proceeding with the case will force the accused to reveal his or her tactics without normally imposing an equivalent burden on the government.[245]

Conversely, the defendant's legitimate interests in avoiding reprosecution become particularly strong after the government has completed the presentation of its case-in-chief. If the defense decides not to offer evidence, it will have largely completed its efforts in the first trial. The frequent defense preference for a chance to "end the dispute then and there with an acquittal,"[246]

[245] The strategic disadvantages of continuing the first trial conceivably might be greater for the prosecution than for the defense if the mistrial problem happened to arise at or near the close of the accused's defense but before the government had begun a crucial rebuttal.

[246] United States v. Jorn, 400 U.S. 470, 484 (1971) (Harlan, J.).

rather than to start over from scratch, seems entitled to particular weight, because the defendant already will have borne essentially the full burden of one complete trial. If, instead, the accused intends to present evidence in defense, portions of his or her strategy will be exposed as soon as the defense begins; a mistrial after this point, therefore, will provide the government with a form of discovery that can prove useful upon retrial, regardless of whether the defense tactics were startlingly unexpected or effective.[247]

Stringent limitations upon mistrial are thus appropriate in all situations arising after the close of the prosecutor's case-in-chief. Even when the first trial has produced no specific tactical setback to the prosecution and even when there is no conceivable possibility of governmental bad faith, either in the prosecutor's triggering the mistrial situation or in the judge's selecting among alternatives for resolving it, the declaration of mistrial will sharply increase the overall burden of defending the case and tend to increase the prospects for conviction in ways often difficult or impossible to demonstrate.

C. *A Framework for Determining the Propriety of Reprosecution After Mistrial*

As the above analysis illustrates, mistrial situations arising at each stage of the trial can be identified as involving either a particularly acute or a relatively remote danger to the interests traditionally protected by the double jeopardy clause. This does not mean that mistrial can simply be prohibited in the first group of situations and freely allowed in the second. Strong interests clash in both contexts and discriminating analysis is necessary. As already noted, relatively stringent safeguards are necessary in the first context and a more flexible approach is appropriate in the second. The content of these two approaches remains to be specified.

The present section considers first the problem of determining the stage of the trial at which double jeopardy analysis should begin—that is, the stage at which jeopardy should be deemed to "attach." It then describes a framework within which the propriety of mistrial can be assessed when double jeopardy principles are applicable. Subsequent sections illustrate the application of the suggested approach in the context of specific

[247] *See* text accompanying notes 239-40 *supra*.

mistrial problems and specific alternatives to the mistrial solution.

1. When Should Jeopardy Attach?

It has been considered settled that the various protections of the double jeopardy clause commence only when the jury is sworn or, in a nonjury trial, when the judge begins to hear evidence.[248] This rule has deep historical roots but no remaining basis in logic or policy.[249] The rule provides either too much protection or too little, because safeguards become available in jury trials sooner than in nonjury trials, but do not become available soon enough to protect fully against governmental action that deprives the defense of a potentially favorable panel. The first problem might be solved by holding that jeopardy attaches at all trials only when testimony begins, as the American Law Institute has proposed.[250] But this approach would eliminate protection, between the times the jury is sworn and testimony opens, for the defendant's interest in retaining a panel that he or she has helped to select. The importance of this interest amply justifies a standard for jury trials different from that applicable in nonjury cases. Indeed, *Downum*, *Jorn*, and *Somerville* all recognize the applicability of double jeopardy principles before the opening of testimony.[251]

The alternative solution is to make protection for the defense interest complete by holding that jeopardy attaches at an earlier stage, the opening of voir dire providing the most convenient point of demarcation.[252] Mistrial still could be declared properly after this point, under the usual—and far from overly

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[248] *See* cases cited note 14 *supra*.

[249] *See* text accompanying notes 228-31 *supra*.

[250] MODEL PENAL CODE § 1.08(4) (Proposed Official Draft 1962). The commentary explains that "[t]here seems to be no reason to perpetuate the distinction" between the point of attachment in jury and nonjury cases. *Id.* § 1.09, Comment at 53 (Tent. Draft No. 5, 1956).

[251] *See* text accompanying notes 61, 70 & 78 *supra*. In *Jorn*, the mistrial occurred after an Internal Revenue Service agent had been called as a witness to put into evidence the allegedly fraudulent tax returns, but counsel then had stipulated to these exhibits and they were introduced into evidence without objection. United States v. Jorn, 400 U.S. 470, 472 (1971) (Harlan, J.).

[252] The opening of voir dire is the moment at which the trial has been deemed to begin for purposes of the defendant's right to be present at trial, Hopt v. Utah, 110 U.S. 574, 578 (1884); United States v. Miller, 463 F.2d 600, 603 (1st Cir.), *cert. denied*, 409 U.S. 956 (1972), and for purposes of computing pretrial delay in connection with the right to a speedy trial, COMM. ON THE ADMINISTRATION OF THE CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDELINES TO THE ADMINISTRATION OF THE "SPEEDY TRIAL ACT OF 1974," at 7-8 (1975).

rigid—standards, but there would at least be a framework within which the defendant's interest in preserving a potentially favorable tribunal, during the period when the panel is unsworn or only partially constituted, could be adequately weighed.[253]

A variety of considerations nevertheless argue against advancing the point of attachment. First, the due process clause presumably affords protection during the voir dire period against a mistrial deliberately induced to deprive the defendant of a potentially favorable panel;[254] relief is thus already available, at least for the most flagrant abuses.[255] Second, if—as I believe[256]—double jeopardy protection ordinarily should be rather limited in situations arising before testimony begins, extending double jeopardy protection to the period prior to the formal swearing of the jury will not make radically more stringent safeguards applicable. The relatively minor differences in the treatment of cases arising immediately before and immediately after the jury is sworn might therefore be considered justified by the long history of the traditional rule, by the symbolic significance of swearing the jury, and by the possibly heightened anxiety and strain for the accused that may be produced by this ritual.[257]

Although the case for advancing the point of attachment is accordingly less decisive than might at first appear, this reform remains appropriate. Eliminating the arbitrary foreclosure of double jeopardy inquiry and permitting meaningful functional evaluation of the effect of mistrial are too important to be defeated by the perceived significance of the jury-swearing ritual. Indeed, the ritual notion is largely circular because any dramatic impact of swearing the jury may be traceable to the fact that this is the moment at which jeopardy has been deemed to attach.

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[253] Normally, of course, the approximate composition of the jury cannot be predicted at the early stages of the voir dire, and so mistrial at this stage rarely would raise serious double jeopardy problems. The attachment of jeopardy would mean only that the question whether a tribunal favorable to the defendant had begun to take shape could be addressed. For the approach under present law, which makes this issue irrelevant until the jury is formally sworn, see cases cited note 230 *supra*.

[254] *Cf.* United States v. Marion, 404 U.S. 307 (1971) (sixth amendment right to speedy trial does not apply to delays occurring prior to formal accusation by indictment or arrest, but due process clause might require dismissal of charges, under some circumstances, if defendant can show actual prejudice resulting from preaccusation delay).

[255] On the difficulty of proving allegations of this kind, see text accompanying notes 321-23 *infra*.

[256] *See* text accompanying notes 258 & 261 *infra*.

[257] *See* Serfass v. United States, 420 U.S. 377, 389-92 (1975).

Jeopardy therefore should be deemed to attach as soon as the process of selecting the jury begins.

2. Resolving the Double Jeopardy Issue

As noted above, once principles of double jeopardy come into play, the propriety of mistrial should be determined by a relatively flexible standard when difficulties arise in two circumstances:[258]

> (1) before the opening of testimony, provided that jury selection has not been unusually difficult *and* there are no concrete indications that the panel might be unusually favorable to the defense; and
>
> (2) between the opening of testimony and the close of the government's case-in-chief, provided that the underlying difficulty is not attributable to the prosecution, the prosecution has suffered no specific tactical setback during the course of the trial, *and* jury selection has not been especially difficult or advantageous to the defense.

On the other hand, more stringent safeguards are necessary in three groups of situations.[259] These are situations in which a trial difficulty arises:

> (1) before the opening of testimony, if jury selection has been unusually difficult or advantageous to the defense;
>
> (2) between the beginning of testimony and the close of the government's case, if the prosecution is responsible for the difficulty, if the proceedings have produced a specific tactical disadvantage for the prosecution, *or* if jury selection has been especially difficult or advantageous to the defense; and
>
> (3) after the close of the prosecution's case, regardless of the circumstances.

Accordingly, before passing upon the propriety of mistrial, a trial judge will need to determine first whether the situation is one calling for the application of a flexible standard or a relatively stringent one. Certain situations necessitating the more stringent requirements—specifically, an exceptionally lengthy voir dire, prosecutorial responsibility for the mistrial problem, or termination of the government's case-in-chief—will be discerned

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[258] *See* text accompanying notes 242-44 *supra*.

[259] *See* text accompanying notes 242-47 *supra*.

readily. Other circumstances requiring application of a stricter approach—a specific tactical setback to the prosecutor or a concrete basis for expectations that the panel might be unusually favorable to the defense—will be detected less easily. As a result, the trial judge's initial step should be to provide the defense with an opportunity to call to the judge's attention the existence of any facts that would make more stringent safeguards appropriate, and the judge should then make explicit findings on the points raised as part of the initial choice of the applicable standard.[260]

Many cases undoubtedly will present close questions on the issue of tactical setback or the favorable jury, as of course mistrial cases always have. But defense counsel at least will have focused attention on these issues from the outset. Moreover, when the factual issues are close, the trial judge normally should resolve any doubts in favor of the defendant, because such a ruling will not absolutely foreclose the possibility of mistrial but will require merely that this ultimate question be resolved by a particularly strict set of standards. Finally, any court subsequently confronting a double jeopardy claim will be able to consider the factual issues in light of a record that is adequately developed.

In short, the first step in any mistrial inquiry should be a threshold determination of the question whether the interests at stake require strict or more flexible limitations upon mistrial. This threshold inquiry will not eliminate all sources of uncertainty in mistrial cases, but it will at least focus attention on the relevant issues from the outset, narrow the range of doubt compared to the present unstructured standards, and provide a more concrete indication of the way in which the presence of any particular factor should affect the mistrial decision itself.

a. *The Flexible Standard: Sound Judicial Administration*

Once the judge has determined that the mistrial situation is *not* one of those in which the threat to double jeopardy interests is particularly acute, the mistrial decision should be made in accordance with a relatively flexible standard. The content of

[260] Because *Perez* requires a cautious exercise of discretion at the time mistrial is declared, failure to make an explicit record of this kind could itself constitute a double jeopardy violation. *Cf.* North Carolina v. Pearce, 395 U.S. 711 (1969) (increase of sentence after retrial invalid unless reasons for increase specified in record at time of resentencing); Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea invalid unless elements of proper waiver spread on record when plea accepted).

this standard remains to be specified. In the situations under consideration, the danger of prosecutorial manipulation is remote and the possibility that the judge's mistrial determination will be reached in bad faith is relatively slight. Nevertheless, the burden of retrial upon the defendant, though not as severe as in some mistrial contexts, will be significant. Accordingly, the defendant is entitled to some protection against the burden of reprosecution, but the nature of this burden ordinarily will not be sufficient to justify awkward or expensive alternatives to mistrial, and the trial judge normally will be in a position to render a fair and trustworthy judgment on the need to abort the proceedings.

These considerations suggest that the trial judge should, first, call upon defense counsel to state the defendant's objections to mistrial. If alternatives to mistrial are proposed and the judge sees difficulties with them, the perceived difficulties should be explained so that the parties will have an opportunity to eliminate them.[261] This sort of colloquy will take some minutes of the court's time; it may require even more if the defense needs a reasonable period for consultation or reflection. But at stake is the considerable time and effort already invested in the first trial by the defendant and all the other participants. There is accordingly no justification for a peremptory declaration of mistrial, even under a relatively flexible standard, and retrial should be barred if the trial judge has given the defense no opportunity to state its position.[262]

After hearing the views of the defense and considering possible alternatives, the trial judge must determine whether mistrial is appropriate. If a reasonable alternative is available, it should not, of course, be rejected. But if a conceivable alternative involves serious disadvantages, the judge may appropriately reject that course even if its difficulties are not altogether insuperable. The very expensive alternative of completing the first trial was, for example, properly rejected in *Somerville*. The

[261] The parties might agree, for example, to proceed with an 11-member jury. Or the defendant might agree to stipulate facts that otherwise could be proved only by the testimony of a missing prosecution witness.

[262] Emergencies might arise in which it would be necessary, and therefore proper, for the judge to take action before contacting the defense. But the judge almost always will be able to make some effort to communicate with defense counsel before taking irrevocable action. *See, e.g.*, Commonwealth *ex rel.* Walton v. Aytch, 352 A.2d 4 (Pa.), *cert. denied*, 97 S. Ct. 178 (1976) (at 11 p.m., a sequestered juror sought permission to return home to deal with a family emergency; discharge of the juror and resulting mistrial held improper because the defense was not consulted).

defendant's interests in the situations under consideration are of constitutional dimension, but they are nonetheless sufficiently limited that they may properly give way to what the *Somerville* Court described as "some important countervailing interest of proper judicial administration."[263]

When mistrial has been declared, a court examining a double jeopardy claim must assure itself that the defense had an opportunity to air its views, that these views were *considered*, and that the trial judge reached a reasoned decision. A trial judge who rejects an alternative for no reason or for a patently frivolous reason will not have provided the minimal attention to double jeopardy interests that is always appropriate, and retrial should be barred. But when the trial court renders a responsible judgment, its decision is entitled to considerable deference. A reviewing court should not, for example, bar retrial because it concludes that the inconveniences of a particular alternative were worth bearing or because it discovers a new alternative not raised by the judge or the parties; such an approach would promote uncertainty and provide windfall immunity to defendants in a context in which the potential for prejudice is too limited to justify these "hindsight costs."

The foregoing standard may be described as one prohibiting retrial unless justified by considerations of "sound judicial administration." It rejects those decisions, such as *Gori*, that are inadequate to vindicate even relatively limited double jeopardy interests. But its conception of the trial judge's duty and of the reviewing court's role nevertheless places it rather close to the relatively permissive tradition exemplified by the early cases and by *Somerville*. This conception seems fully responsive to legitimate double jeopardy concerns in a very substantial portion of the mistrial situations.

b. *The Stringent Standard: Strict Necessity*

More stringent safeguards will be necessary, however, in the three groups of situations involving an acute threat to double jeopardy interests. In all of these situations, retrial involves an unusual hardship or a great potential for tactical disadvantage to the defense.[264] The trial judge, of course, should allow defense counsel to argue the mistrial question just as in cases involving

[263] Illinois v. Somerville, 410 U.S. 458, 471 (1973).

[264] *See* text accompanying notes 242-47 *supra*.

less serious possibilities for prejudice. But because the defendant's interests in avoiding reprosecution are now particularly strong, the judge cannot appropriately reject an alternative to retrial merely because it appears clumsy or inefficient or because it would interfere with an "important countervailing interest." Alternatives should be pursued unless they present truly compelling difficulties.

The dangers of retrial seem so great in this context that the question may fairly be raised whether mistrial is improper even if no alternatives are available. In considering this question, a distinction must be drawn between mistrial difficulties occasioned by events beyond governmental control and those difficulties attributable to the prosecutor or the judge. In the former case, the extraneous nature of the precipitating event provides assurance that harassment is not involved. The chief potential for manipulation arises from the danger that the judge may not seek alternatives in good faith once a pretext for mistrial presents itself, and even this problem is absent if alternatives to mistrial are truly unavailable. Although the burden upon the defendant remains severe, these situations, which would include cases of military necessity or irrevocably deadlocked juries, are ones in which "the public's interest in fair trials designed to end in just judgments"[265] always has been held to take precedence. Thus, mistrial should be appropriate when difficulties are caused by an event beyond governmental control and when no alternative solution is available.

When the judge or the prosecutor is at fault in creating the initial difficulty, however—as when witnesses are not subpoenaed or their willingness to testify is not properly assured—the potential for harassment is nearly always acute. Because reprosecution necessarily subjects the defendant to severe inconvenience in any of the situations requiring application of the stringent standard, a rule permitting mistrial in the event of governmental error could become a source of serious abuse. Apart from the danger of harassment, fairness would seem to require that the government bear the consequences of its error, rather than impose a particularly heavy burden on the defendant and gain a fresh start for itself as an added reward. Accordingly, where the prosecutor or the judge is responsible for a mistrial difficulty arising in situations calling for strict safe-

[265] Wade v. Hunter, 336 U.S. 684, 689 (1949).

guards, retrial normally should be barred even if alternatives are unavailable.[266]

Just as the trial judge must closely scrutinize the need for mistrial in situations in which stringent safeguards are appropriate, a court subsequently confronting a double jeopardy claim in such cases should subject any mistrial order to searching review. Close scrutiny does involve the danger that retrial may be barred even when the trial judge made a scrupulous effort to render a fair judgment. But the costs of hindsight are fully justified in this context. Meaningful review is necessary to prevent abuse at the trial level, and, above all, immunity from reprosecution cannot be considered a mere windfall because retrial in this context always involves a danger of substantial prejudice to the defendant.

The second standard may be described as one prohibiting retrial unless the mistrial was justified by "strict necessity." The approach is closely akin to that mapped out in *Downum* and *Jorn*, but it is confined to a much narrower range of situations, excluding, for example, the facts of both of those cases.[267]

Neither the standard of sound judicial administration nor the standard of strict necessity produces an automatic answer to most mistrial problems: the two standards scarcely could be responsive to the relevant interests if they did. Rather, each provides a framework within which a wide range of factors must be examined and judgment exercised. For this reason, it does not seem overly troublesome that some problems that might arise after the prosecution rests could turn out to be less in need of the strict approach than others arising before this point of demarcation. The two standards provide guidelines sufficiently specific that choice between them normally will and should affect the result, but both permit an appropriate recognition of the circumstances of the exceptional case.

D. *Particular Mistrial Situations*

The application of the two standards may be illustrated briefly by considering some of the mistrial situations that have proved particularly troublesome to the courts.

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[266] For recent decisions in agreement with this requirement that retrial be barred even in the absence of alternatives, *see* cases cited in notes 125-27, 157 *supra* & accompanying text.

[267] In both *Downum* and *Jorn*, mistrial was declared before the opening of testimony, *see* text accompanying notes 61 & 70 *supra*, and there was no indication that

1. Formal Defects in the Institution of the Proceedings

Defects in the indictment frequently are discovered before any testimony has been taken. *Somerville*, for example, was a case of this kind. In these situations, as long as jury selection has not been unusually difficult and has not produced a panel unusually favorable to the defense, the propriety of mistrial should be judged by considerations of sound judicial administration. Pursuant to this standard, alternatives must of course be considered, but they may be rejected if they involve significant inconvenience or expense. Mistrial was therefore proper in *Somerville* itself.

Courts often hold mistrial improper if they find the procedural defect to be "insubstantial."[268] This result is inappropriate when the relatively flexible principles of sound judicial administration are applicable. If the trial judge has made a conscientious effort to resolve a genuine difficulty, reprosecution should not be barred merely because the court considering the double jeopardy claim would have resolved the matter differently in the first instance. Cases holding that retrial is permissible when a "reasonable but erroneous belief" prompts the judge to declare a mistrial[269] therefore reflect the sounder approach in situations in which the danger of prejudice to the defendant is remote.

A stricter approach is necessary, even before the opening of testimony, in those rare cases in which special circumstances indicate that the jury might be unusually favorable to the defense. Under the standard of strict necessity, alternatives must be pursued unless they present compelling problems, and if the prosecution is responsible for the underlying difficulty, retrial will be barred even when no alternatives are available. This may seem a draconian sanction for technical difficulties arising so early in the trial, but in fact a workable alternative almost always will be available; the original jurors may, for example, be reimpaneled after defects in the indictment are cured.[270] If alterna-

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jury selection had been unusually difficult or unusually advantageous to the defense. The standard of "strict necessity," therefore, would not have been applicable. *See* text accompanying note 258 *supra*. For an analysis of the *Downum* and *Jorn* facts in terms of the proposed standards, see text accompanying notes 273-75 *infra*.

[268] *See* note 104 *supra* & accompanying text.

[269] *E.g.*, United States v. Sedgwick, 345 A.2d 465, 472 (D.C. 1975), *cert. denied*, 425 U.S. 966 (1976).

[270] This procedure, though technically involving a reprosecution, fully protects the defendant's interest in presenting his or her case to the original tribunal; the approach is thus functionally equivalent to a continuance rather than a mistrial. For cases employ-

tives are truly unavailable, it is not unfair to require the prosecution to bear the burden of its error in this limited situation involving a concrete danger of prejudice to the defendant.

The same is true a fortiori when formal defects in the institution of the proceedings are discovered after testimony has begun. The very strict rule recently announced by the California Supreme Court,[271] barring retrial whenever the judge or the prosecutor is responsible for such defects, is not normally appropriate for situations arising before evidence is taken. But the result was proper on the facts of the case before the court because testimony had been heard for a full day at the first trial.

2. Unavailability of Prosecution Witnesses

Witnesses may prove to be unavailable because of prosecutorial error or because of events wholly beyond governmental control. Many decisions bar retrial without regard to prosecutorial fault, the stage of the proceedings, and sometimes even the availability of alternatives.[272]

This stringent approach is normally inappropriate when the difficulty is discovered before testimony has begun. Both *Downum* and *Jorn* were cases of this kind. In *Downum*, the prosecution bore responsibility for allowing the jurors to be selected when a key witness had not been served, but there was no indication that the jury selected would offer any special advantage to the defense. Retrial therefore presented little danger to double jeopardy interests, and the propriety of mistrial should have been judged by considerations of sound judicial administration. Because all available alternatives involved significant drawbacks,[273] mistrial was an appropriate solution. The *Downum* opinion provided a valuable caveat concerning the dangers of the permissive approach that had prevailed until that time, but its

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ing the device of reimpaneling the original jury, see, for example, Lovato v. New Mexico, 242 U.S. 199 (1916); People v. Cobb, 19 Ill. App. 3d 520, 311 N.E.2d 702 (1974).

The principal disadvantage associated with this approach is that the jurors could be subjected to prejudicial publicity or even to pressure by the parties during the interval before resumption of the proceedings. This cannot, however, be considered a compelling problem because, at worst, a juror could be disqualified if and when such a difficulty arose.

[271] People v. Upshaw, 13 Cal. 3d 29, 528 P.2d 756, 117 Cal. Rptr. 668 (1974), *discussed in* note 102 *supra*.

[272] *See* notes 124-32 *supra* & accompanying text.

[273] 372 U.S. at 742-43 (Clark, J., dissenting). The Court made no effort to minimize the difficulties emphasized in the dissenting opinion. *See* note 69 *supra*. If these supposed difficulties had been without substance, mistrial would have been improper, and the result in *Downum* would have been correct.

analysis was misapplied in the circumstances actually presented. The Supreme Court might therefore reverse the frequent practice of disregarding the language of a troublesome precedent and treating it as limited to its facts. The language of *Downum* remains useful, but its holding does not. *Downum* should be overruled.

Jorn stands on somewhat firmer ground. There the judge refused to let certain witnesses testify because he believed that they were unaware of their constitutional rights. This occurred before any testimony had been presented.[274] Thus, the propriety of mistrial should have been judged by a relatively flexible standard. The trial judge, however, gave defense counsel no opportunity to argue the mistrial question, to suggest alternatives, or to point out factors associated with the selection of the jury that might have required caution before discharging it. Therefore, the minimal requirements of sound judicial administration had not been satisfied, and the Supreme Court properly held retrial to be barred. If the trial judge had considered alternatives but had found a reasonable basis for rejecting them, mistrial would have been proper, notwithstanding intimations in the plurality opinion that such a determination might not have withstood review.[275]

3. Inability of the Jury To Agree upon a Verdict

The courts differ radically in their approach to the hung-jury problem in cases in which the defendant has opposed the jury's discharge or has had no opportunity to question it.[276] Some courts subject the deadlock determination to the most rigorous scrutiny, while others—apparently the majority—leave the matter almost wholly to the discretion of the trial judge. The prevailing view gives inadequate weight to the fact that the problem of jury deadlock arises not merely after the close of the prosecutor's case-in-chief, but after complete presentation of all defense and rebuttal evidence. Mistrial at this late stage of the case involves acute possibilities for prejudice to the defendant.[277] Indeed, in some cases the judge's diligence in seeking a verdict could be affected by his or her sense of how well the trial has

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[274] *See* note 251 *supra*.
[275] 400 U.S. at 485-86.
[276] *See* text accompanying notes 168-85 *supra*.
[277] *See* text accompanying notes 245-47 *supra*.

gone for the prosecution. The need for mistrial therefore should be tested by the strict necessity standard.

This does not, of course, imply that the trial court should coerce the jury into a verdict by any available means. Refusal to discharge the jury after repeated claims of deadlock and fatigue is not required in order to provide meaningful double jeopardy protection; nor are coercive instructions required, such as the generally disfavored *Allen* charge.[278] On the other hand, there is no justification for a judge peremptorily to discharge a jury without consulting defense counsel and without establishing unqualified evidence of deadlock for the record. When the defendant urges continued deliberations, with or without other techniques for producing agreement, the judge must remain free to reject suggestions that would be overly coercive. But when the judge is unable to find that suggested means of ending deadlock would be coercive, the defendant's constitutionally protected interest in "end[ing] the dispute then and there with an acquittal"[279] is entitled to preference.

The dangers presented by mistrial in this context similarly justify searching review of the record upon which a deadlock determination rests. Thus, reprosecution should be barred even when a court considering a double jeopardy claim holds inadequate a finding that may have been reached by a trial judge in the best of faith. But such situations will be infrequent, at least in the case of trial judges who understand the need for the utmost caution in discharging a possibly hung jury. And the hindsight problem in any event is entitled to rather little weight in the jury deadlock situation. The only defendants who would be immunized from reprosecution are those who have made a full presentation of their defense and therefore face a particularly great potential for prejudice as a result of retrial. Moreover, the law enforcement costs of sustaining the double jeopardy claim are particularly weak because the defendants in question will be

[278] The charge states in part that "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself." Allen v. United States, 164 U.S. 492, 501 (1896). This instruction, which has been viewed as pressuring the jurors in the minority to accede to the majority's view, was upheld by the Supreme Court in *Allen*, but has been the subject of extensive criticism, *see, e.g.*, ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4(b), at 151 (1968). The *Allen* charge has now been disapproved in many states. *E.g.*, Commonwealth v. Spencer, 422 Pa. 328, 275 A.2d 299 (1971).

[279] United States v. Jorn, 400 U.S. 470, 484 (1971) (Harlan, J.).

the ones whose possible guilt provoked substantial debate among members of the first jury.[280]

The Third Circuit's decisions in *Russo* and *Webb*,[281] which departed from the prevailing view by examining closely the basis for the jury-deadlock determination, therefore reflect a more suitable approach to the hung-jury problem. This approach should not result in undue pressure upon the jury or in measures compromising the integrity of the unanimous verdict, but it will provide the stringent protection for double jeopardy interests that is appropriate in this context.

E. *Particular Alternatives to Mistrial*

The viability of alternatives to mistrial in any particular case is crucial in deciding whether mistrial is justified by considerations of sound judicial administration or strict necessity.[282] It would be hazardous to suggest rules for determining the viability of alternatives in advance because alternatives to mistrial are as various as the myriad problems to which they must respond, and because the relative importance of any obstacle to pursuing an alternative necessarily depends upon the strength of the countervailing interests against mistrial in a particular case. Three kinds of alternatives, however, do present questions of sufficient generality to justify separate treatment here.

1. The Eleven-Member Jury

When a juror becomes ill, is disqualified, or is unable to serve for other reasons, and when no alternate juror is

[280] Indeed, it has been argued that on this ground reprosecution should be impermissible even after a genuinely hung jury. Silverstein, *Double Jeopardy and Hung Juries:* United States v. Castellanos, 5 RUTGERS-CAMDEN L.J. 218, 226-29 (1974). The notion seems to be that a hung jury necessarily establishes a reasonable doubt concerning the defendant's guilt. This need not be the case, however, because a hung jury may indicate only that all the jurors consider the defendant "probably" guilty and one juror entertains a doubt that the 11 others consider unreasonable. *See* Johnson v. Louisiana, 406 U.S. 356, 362-63 (1972). Moreover, barring reprosecution after a hung jury probably would create irresistible pressure for abolition of the unanimity requirement, a step that is now permissible at least in the state courts. Apodaca v. Oregon, 406 U.S. 404 (1972). As long as the deadlock is genuine, therefore, the decisions tend to uphold reprosecution even after several hung juries. *See, e.g.*, United States v. Corbitt, 497 F.2d 922 (3d Cir. 1974), *aff'g mem.* 368 F. Supp. 881 (E.D. Pa. 1973) (third trial permissible after two hung juries); United States v. Castellanos, 478 F.2d 749 (2d Cir. 1973) (third trial permissible after two hung juries); United States v. Persico, 425 F.2d 1375 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (fifth trial permissible after two hung juries and two reversals of convictions). *But see* Preston v. Blackledge, 332 F. Supp. 681 (E.D.N.C. 1971) (fifth trial barred after four hung juries).

[281] For a discussion of *Russo* and *Webb*, see text accompanying notes 175-82 *supra*.

[282] *See* text accompanying notes 261-66 *supra*.

available,[283] the trial court must decide whether it is permissible to continue the trial with a reduced panel. Statutes or rules of procedure fix the size of a complete jury, usually at twelve.[284] Upon the incapacitation of a juror, the defense might invoke such provisions and object to the reduced panel. If the defense does object, it may then affirmatively seek mistrial, but even if the defense objects both to reduction of the panel and to mistrial, the accused cannot reasonably base double jeopardy objections upon the trial judge's failure to pursue an alternative that the defense itself rejected.

The more troubling situation occurs when the defendant prefers to continue the trial with a reduced panel, but the prosecution demands a mistrial. In *Singer v. United States*,[285] the Supreme Court held that a defendant has no constitutional right to waive a trial by jury, explaining that "the Government, as a litigant, has a legitimate interest in seeing that cases . . . are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[286] The Court declined to elaborate on the nature of this interest and even held that the prosecution need not articulate its reasons for demanding a jury trial. Applying the same principle to the more limited question whether the prosecution may demand a jury of a particular size, most courts have upheld mistrial when the prosecution objects to the alternative of an eleven-member panel.[287]

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[283] Alternate jurors are not selected in all cases, and most jurisdictions require that alternates be discharged when the jury retires for deliberations. *E.g.*, FED. R. CRIM. P. 24(c); *see* United States v. Beasley, 464 F.2d 468 (10th Cir. 1972); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 388, at 52-53 (1969); ABA STANDARDS RELATING TO TRIAL BY JURY § 2.7, at 81-83 (1968).

[284] *E.g.*, FED. R. CRIM. P. 23(b).

[285] 380 U.S. 24 (1965).

[286] *Id.* at 36.

[287] For a discussion of recent lower court decisions to this effect, see notes 111-12, 122 *supra* & accompanying text. *Contra*, Hutchens v. District Court, 423 P.2d 474 (Okla. Crim. App. 1967). *See also* United States v. Potash, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941); Gardes v. United States, 87 F. 172 (5th Cir.), *cert. denied*, 171 U.S. 689 (1898).

The federal decisions appear to be based in part on the language of FED. R. CRIM. P. 23(b), which provides that "[j]uries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12." Although *Singer* interpreted analogous language in rule 23(a) as granting the government a virtually unqualified prerogative to withhold its consent to a waiver of jury trial, *Singer* is inapplicable to the problem presented by waiver of a jury of particular size. *See* text accompanying notes 290-93 *infra*. The courts therefore remain free to adopt a construction of rule 23(b) more consonant with double jeopardy policies by interpreting the rule to require that, when necessary to avoid mistrial, the prosecutor's stipulation to a panel of less than 12 shall not be unreasonably withheld. Under such an interpretation, the government could be called upon to articu-

This rule poses a serious threat to double jeopardy interests, as the recent decision in *United States v. Means*[288] illustrates. The defendants, leaders of the American Indian Movement, were prosecuted on numerous charges arising out of disorders at Wounded Knee, South Dakota. After an eight-and-a-half-month trial, the jury retired to deliberate, but one of the jurors became ill and had to be excused. The defendants agreed to accept the verdict of the remaining eleven jurors, but the prosecutor refused, explaining to the press that he thought the chances for conviction were slim.[289] The prosecutor therefore sought a mistrial, and the judge apparently did not believe that he had the power to proceed over the prosecutor's objections to the reduced panel. The judge ultimately dismissed the indictment with prejudice because of prosecutorial misconduct unrelated to the eleven-member jury question. But the prosecutor's action in relation to that question demonstrates that a rule granting the prosecution broad power to foreclose the alternative of a reduced panel invites manipulation and harassment, and exposes defendants to the potentially severe burden of a second, long trial, regardless of whether the government's interest in a complete jury of twelve is a substantial one in the particular case.

What, in fact, is the nature of the prosecution's interest in a panel of twelve? *Singer* failed to explain why the government might properly object to dispensing with the jury altogether, but the principal factors appear to be a concern that a judge might be unduly favorable to the defense in certain kinds of cases, a concern that a jury verdict may be necessary to legitimate severe sanctions in cases of the most serious felonies, and a concern for establishing reciprocity in the tactical options available to the prosecution and the defense.[290] Reducing the panel from twelve to eleven, however, scarcely affects these interests. The verdict is still rendered by independent citizens, and the panel remains sufficiently large to provide solemnity and force to its verdict. Indeed, although courts in many early cases insisted that

late its objections to a reduced panel, and the court could weigh these objections against the burden that would result from mistrial. If rule 23(b) were not so construed, its application might, under some circumstances, violate the double jeopardy clause. *See* text accompanying notes 303-08 *infra*.

[288] 513 F.2d 1329 (8th Cir. 1975).

[289] *See* United States v. Banks, 383 F. Supp. 389, 397 (D.S.D. 1974), *appeal dismissed sub nom.* United States v. Means, 513 F.2d 1329 (8th Cir. 1975).

[290] *See* ABA STANDARDS RELATING TO TRIAL BY JURY §§ 1, 2(a), Commentary at 30-32 (1968).

"[t]welve is the magic number,"[291] the Supreme Court, in holding that the sixth amendment right to trial by jury does not guarantee a panel of any particular size, found "little reason to think that [the goals of jury trial] are in any meaningful sense less likely to be achieved when the jury numbers *six*, than when it numbers 12 . . . ."[292]

Nor does reciprocity justify honoring the prosecution's objections to a jury of eleven. Because a defendant undoubtedly will insist upon a panel of twelve when doing so is tactically advantageous,[293] the prosecutor may feel entitled to the same privilege. But the double jeopardy clause by its nature condemns this claim to reciprocity. No matter how many times a defendant is convicted, he or she may always receive another trial if the prior proceedings were unfair. But a single acquittal, no matter how tainted by error, precludes retrial; even before acquittal, the proceedings may never be aborted, once jeopardy has attached, simply because the government's prospects seem dim.

Prosecution objections to an eleven-member jury, therefore, seldom will have a legitimate basis, and in most instances this alternative should not be rejected even under the more flexible standard for passing upon mistrial. A conceivable exception might be, for example, the disqualification of the only woman juror in a rape case in which the defense is based on consent. In such a situation, the court might consider the concern for a balanced panel to be an important, or even compelling, interest. Normally, however, the prosecution should not be able to force a mistrial by refusing to accept an eleven-member jury.

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[291] United States v. Virginia Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964); *see* Patton v. United States, 281 U.S. 276, 288 (1930); Thompson v. Utah, 170 U.S. 343, 350 (1898).

[292] Williams v. Florida, 399 U.S. 78, 100 (1970) (emphasis supplied). The Court concluded, "[T]he fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.' " *Id.* at 102 (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). In light of *Williams*, the language of *Singer* appears inapplicable to the question of governmental consent to changes in jury size, because a 12-member jury is not, in the language of *Singer*, "the tribunal which the Constitution regards as the most likely to produce a fair result." Singer v. United States, 380 U.S. 24, 36 (1965). The 12-member jury nevertheless remains the preferred tribunal under the Federal Rules. *See* FED. R. CRIM. P. 23(b).

[293] A state need not, of course, honor such a demand. Because *Williams* allows cases to be tried by a jury of less than 12, a defendant presumably would have no constitutional basis for an objection to a rule requiring that trials begin with 12 jurors but allowing a verdict to be rendered by a lesser number, even without the defendant's consent, if a juror is unable to continue.

2. Severance in Joint Trials

The question whether the trial court should sever a prosecution against multiple defendants rather than declare a mistrial for all the defendants has been highly problematical. Indeed, even outside of the mistrial context, joinder of defendants presents difficult and controversial problems:

> The traditional rationale for joinder . . . is that of conserving . . . the efforts of the prosecuting attorney, and possibly his witnesses, and of judges and court officials. Severance, on the other hand, is typically sought on the ground that a unified disposition . . . would put those proceeded against at an unfair disadvantage, due to confusion of law and evidence by the trier of the fact and the "smear" effect such confusion can produce.[294]

Prevailing standards for reconciling these competing claims are vague and perhaps unsatisfactory,[295] but for present purposes we need not examine the question whether a joint prosecution should be allowed at the outset of a trial. Our concern rather is with the question whether the interests that initially may have justified joinder lose their force when a mistrial problem arises in the course of a joint trial. For example, once the case has been submitted to the trier of fact, a denial of severance will not save government resources in the first trial and almost always will make reprosecution more time-consuming than if retrial were confined to only one of the original defendants.[296] The same often will be true when mistrial is declared after the close of the prosecution's case-in-chief.[297] In these situations, the government's legitimate interest in preserving the joinder for the sake of efficiency is outweighed substantially by the prejudicial effects of joinder upon the defense. Indeed, these effects may

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[294] ABA STANDARDS RELATING TO JOINDER AND SEVERANCE 1 (1968).

[295] *See id.* § 1.2, at 13-17.

[296] One justification for joinder that might still be applicable in some situations is that a joint trial "may be essential to an understanding of the entire [conspiracy] operation and the role played by each participant." MODEL PENAL CODE § 5.03(4), Comment at 135 (Tent. Draft No. 10, 1960). As a general rationale for joinder, however, this claim is a dubious one. *See* ABA STANDARDS RELATING TO JOINDER AND SEVERANCE 15-17 (1968). In any event, once the trial of one defendant has been completed, the rules of evidence normally should pose no barrier to presenting in a separate trial pertinent testimony concerning the role of another defendant.

[297] The government might be forced to duplicate its rebuttal testimony in some situations, but this duplication of effort normally would be relatively minor compared to the additional effort that would be required to present the case-in-chief a second time against both defendants.

represent the real basis for a prosecutor's resistance to severance.

Several cases suggest that it might be improper to deny severance merely for the convenience of the prosecution, but that fairness to all the defendants may require preserving the joinder.[298] These decisions appear to rest on the theory that if severance is followed by conviction of the first group of defendants, the second jury may be prejudiced by knowledge of the outcome of the first case. This rationale, however, is applicable only in cases attracting unusual public attention, and, even then, the interests of the second group of defendants normally could be protected adequately by the usual remedies for pretrial publicity—continuance, careful probing of prospective jurors on voir dire, or change of venue.[299]

The justifications for denying severance are thus much weaker in some situations than in others, but the decisions do not reflect adequately the corresponding need for a discriminating approach. Although the federal courts of appeals are split on the question whether severance should be ordered to avoid mistrial, the decisions disregard the interests at stake in each case and instead appear to adopt a per se rule. A Fourth Circuit decision, for example, holds flatly that severance need not be considered, and a Sixth Circuit case reaches the opposite conclusion.[300]

A close look at the facts of the two cases suggests that probably both were wrongly decided. The Sixth Circuit decision in *Thomas v. Beasley*[301] involved a Tennessee robbery prosecution. The trial court had declared a mistrial when it was discovered during the testimony of the first witness that counsel for two of

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[298] United States v. Smith, 390 F.2d 420, 422-24 (4th Cir. 1968); United States v. Chase, 372 F.2d 453, 465-66 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

[299] *See* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2805 (1976); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966). Even in the rare situation in which the defendant who must in any event be retried faces a serious danger of publicity impairing the constitutional right to a fair trial, it is far from clear that this danger can justify a restriction of the double jeopardy rights of a third party. *Cf.* Nebraska Press Ass'n v. Stuart, 96 S. Ct. at 2803-04 (defendant's sixth amendment right to a fair trial does not take precedence over first amendment rights of a third party).

[300] *See* text accompanying notes 158-59 & 161-63 *supra*. For a leading pre-*Somerville* case requiring severance, see People v. Davis, 29 Mich. App. 443, 185 N.W.2d 609 (1971). *Contra*, United States v. Iacovetti, 466 F.2d 1147 (5th Cir. 1972), *cert. denied*, 410 U.S. 908 (1973); Oelke v. United States, 389 F.2d 668 (9th Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); cases cited in note 298 *supra*. *See also* N.Y. CRIM. PROC. LAW § 280.10(2) (McKinney 1971).

[301] 491 F.2d 507 (6th Cir.), *cert. denied*, 417 U.S. 955 (1974).

Beasley's codefendants had a conflict of interest requiring that they be excused. The Sixth Circuit held that severance should have been ordered and the trial of Beasley completed. But here the difficulty had arisen early in the proceedings, the government was not responsible for it, and there was no indication that Beasley had gained unexpected tactical advantages in the first trial. Under these circumstances, the propriety of mistrial should have been judged by the relatively flexible considerations of sound judicial administration, and the trial judge's rejection of the severance alternative should have been upheld if that alternative interfered with an important countervailing interest. Because the state was in the early stages of presenting its case, its interest in maintaining the joinder was substantial, and the mistrial for all defendants, including Beasley, should have been held permissible.

In the Fourth Circuit case of *Whitfield v. Warden*,[302] a juror was exposed to prejudicial influence after completion of the state's case-in-chief. Whitfield was willing to proceed with the alternate juror, but his codefendant Baker refused, and mistrial was declared with respect to both. The Fourth Circuit upheld the mistrial, ruling that severance was not an appropriate alternative. But because the difficulty here arose after the prosecution had rested, mistrial should have been allowed only in a case of strict necessity; severance therefore should have been required unless it would have interfered with a truly compelling interest. And no such interest was implicated—because the state had completed presentation of its case-in-chief, more effort likely was necessary to retry both defendants than would have been required to complete the first trial and retry Baker alone. Mistrial therefore should have been held improper with respect to Whitfield.

Cases like *Whitfield* and *Beasley* illustrate the inappropriateness of a per se rule concerning the need for severance. When double jeopardy policies are acutely implicated, the advantages of joinder seldom will amount to the compelling interest required to override the defendant's interest against retrial; but when the danger to double jeopardy interests is remote, joinder in the particular case may involve advantages sufficiently significant to justify mistrial with respect to all the defendants.

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[302] 486 F.2d 1118 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974), *discussed in* text accompanying notes 158-59 *supra*.

3. Alternatives Unavailable Under State Law

In some jurisdictions, minor defects in an indictment may not be curable by amendment, even with the defendant's consent;[303] illness of a trial judge may not be surmountable by assigning a replacement;[304] and the solution to a variety of other mistrial problems may be impeded because certain alternatives are foreclosed under state practice. The Supreme Court has not always been sensitive to the danger such rules of local procedure may present to double jeopardy interests.[305] In his *Somerville* dissent, Mr. Justice Marshall sought to remedy this defect by focusing directly upon the importance of the interests supporting the state's rule against amending the indictment. He found these interests less weighty than the defendant's interests against mistrial and accordingly argued that the state should be required either to abandon its own rule or to forego reprosecution of the defendant.

The kind of analysis proposed by Mr. Justice Marshall opens up a virtually unlimited range of alternatives and necessitates inquiry into the weight to be attributed to a variety of state policies. An analysis of such sweep may be useful in situations requiring application of the strict necessity standard, but it seems inappropriate in cases that should be governed by the more flexible standard, such as *Somerville* itself. In *Somerville*, the difficulty arose before testimony had begun, and the composition of the first jury did not appear to offer the defendant any special advantage. The danger to double jeopardy interests was therefore remote, and the defendant could have been protected adequately by a requirement that the trial judge explore alternatives to mistrial in good faith. Because the alternative of amending the indictment at trial was prohibited by state law, the judge's fairness in rejecting this alternative cannot be doubted. It thus should be improper to question the validity of state procedures excluding a particular alternative in cases, like *Somerville*, that involve only a remote danger to double jeopardy interests.

The analysis should change, however, in cases involving a greater threat to double jeopardy interests. Suppose, for example, that in *Somerville* the defect in the indictment had not been

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[303] *See, e.g.*, Illinois v. Somerville, 410 U.S. 458 (1973); State v. Brooks, 224 Tenn. 712, 462 S.W.2d 491 (1970), *cert. dismissed*, 405 U.S. 127 (1972).

[304] *See* ABA STANDARDS RELATING TO TRIAL BY JURY § 4.3, Commentary at 100-02 (1968).

[305] *See* note 207 *supra*.

discovered until testimony had been completed and the jury was about to retire for deliberations,[306] or that state or federal rules were held to foreclose the possibility of proceeding with an eleven-member jury, even after a protracted trial.[307] Mistrial under such circumstances presents a danger of severe prejudice to the defendant, independent of the possibility of bad-faith conduct by the judge or the prosecutor, and thus evenhanded evaluation of alternatives by the judge may fail to protect the defendant from abuse. In these situations, mistrial is justified only by strict necessity, and no alternative should be rejected unless the difficulties associated with pursuing it are severe. The fact that a state has decided to prohibit a particular procedure should, of course, be entitled to great weight in making this determination. But a court should look behind the state rule and carefully evaluate its importance, before concluding that an alternative is unavailable for double jeopardy purposes.[308]

F. *Consent by the Defendant to Mistrial*

My concern until now has centered on the scope of the accused's right to prevent the declaration of mistrial, in situations in which such a ruling may be antithetical to defense interests. I will now consider the effect of action by the defendant affirmatively seeking mistrial. The Supreme Court has often stated that a defense motion for mistrial ordinarily will remove any barrier to reprosecution.[309] This rule is easy enough to understand when events wholly beyond governmental control trigger the mistrial motion. Suppose, for example, that after a juror dies, the trial judge proposes to continue the trial with the remaining jurors, but the defendant moves for a mistrial. Mistrial is certainly not "necessary," but if the judge follows the course

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[306] *See, e.g.*, State v. Russo, 70 Wis. 2d 169, 233 N.W.2d 485 (1975), *discussed in* text accompanying note 103 *supra*.

[307] *See, e.g.*, United States v. Means, 513 F.2d 1329 (8th Cir. 1975), *discussed in* text accompanying notes 288-89 *supra*.

[308] Though a procedural alternative may be considered available for purposes of the double jeopardy inquiry, a trial judge presumably could not invoke that alternative if it were prohibited by state law. The double jeopardy clause would not force upon the state a procedure it had determined to reject but merely would bar reprosecution of the defendant in these special circumstances presenting a serious threat to legitimate double jeopardy interests. *Cf. Fay v. Noia*, 372 U.S. 391 (1963) (existence of adequate and independent state law ground sustaining conviction does not necessarily prevent examination of underlying constitutional claim by federal court on habeas corpus).

[309] *E.g.*, United States v. Dinitz, 96 S. Ct. 1075, 1079-80 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971) (dictum); United States v. Tateo, 377 U.S. 463, 467 (1964).

preferred by the defense, it is difficult to perceive any danger to double jeopardy concerns.

The rule becomes somewhat more troublesome, however, when the need for mistrial is attributable to error or misconduct by the prosecutor or the judge. Although here too the defense may be granted complete freedom to choose between the burden of a second trial and the possible disadvantages of continuing the first, its preference for mistrial cannot be considered wholly voluntary if the government was responsible for creating its dilemma in the first place. Nevertheless, Supreme Court decisions hold that a defendant may be reprosecuted under these circumstances.

United States v. Tateo [310] provides a striking illustration of this point. Midway through Tateo's trial, the trial judge told the defense counsel that he planned to impose the maximum sentence if Tateo was convicted by the jury. Tateo promptly decided to plead guilty. The plea was later set aside as coerced, but Mr. Justice Harlan, writing for the Court, held that reprosecution was not barred. Without discussing the problem of voluntariness, the Court simply asserted that under the circumstances a mistrial motion by Tateo would have removed any objection to retrial and that his position could be no stronger when instead he had agreed to terminate the proceedings with a conviction.[311] In his subsequent opinion in *Jorn*, Mr. Justice Harlan made explicit the implications of *Tateo* by stating that "the question of 'voluntariness' for purposes of assessing the validity of a plea of guilty . . . must be distinguished from the question of 'voluntariness' for purposes of assessing reprosecutability under the Double Jeopardy Clause."[312] Regrettably, neither *Tateo* nor *Jorn* explains why these two questions are distinguishable or when, apart from situations in which prosecutorial or judicial impropriety is specifically intended to prevent an acquittal,[313] a mistrial motion would be rendered involuntary for double jeopardy purposes.

The Court's recent decision in *United States v. Dinitz*[314] sheds much-needed light on the problem. Dinitz' principal counsel had made a number of improper comments in his opening statement. When the judge's repeated admonitions proved un-

[310] 377 U.S. 463 (1964).
[311] *Id.* at 467-68.
[312] 400 U.S. at 485 n.11.
[313] *See id.* at 485 n.12.
[314] 96 S. Ct. 1075 (1976).

availing, he excluded the lawyer from the trial and offered Dinitz the option of having co-counsel proceed with the trial, obtaining a recess until the court of appeals could rule on the propriety of the exclusion order, or moving for a mistrial. Dinitz moved for a mistrial, but after his retrial and conviction, the Fifth Circuit held that the second trial had subjected him to double jeopardy. The panel's opinion, upheld by an eight-to-seven majority of the circuit en banc, concluded that the trial judge had "overreacted" by issuing the exclusion order; by failing to examine alternative ways to discipline the attorney, the judge had confronted the defendant with a "Hobson's choice," and the decision to move for a mistrial in these circumstances therefore did not represent a valid "waiver" of Dinitz' right to present his case to the first jury.[315]

The Supreme Court rejected this approach and held retrial proper. Writing for six members of the Court,[316] Mr. Justice Stewart reasoned that in mistrial situations:

> the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by a prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed in the event of such error.[317]

In effect, the Court held waiver analysis inappropriate because it found no violation of the underlying constitutional right. The *Perez* doctrine was seen as giving the defendant not the right to an untainted first trial but solely the right to prevent the proceedings from being aborted without his or her consent once the trial does become tainted by the actions of the prosecutor or the judge.

The Court's analysis thus distinguishes between judicial error that creates a possible need for mistrial and judicial error in passing upon that need: error of the latter kind will insulate the defendant from reprosecution, while error of the former kind will not. Thus, in *Dinitz*, it was irrelevant whether the trial judge failed to pursue alternative disciplinary action or other-

[315] 492 F.2d 53, 59 (5th Cir.), *aff'd*, 504 F.2d 854 (5th Cir. 1974) (en banc), *rev'd*, 96 S. Ct. 1075 (1976).

[316] Mr. Justice Stevens did not participate and Justices Brennan and Marshall dissented.

[317] 96 S. Ct. at 1081 (footnote omitted).

wise erred in excluding defense counsel, because even if that action was improper, the judge did consider alternatives to mistrial and did honor the defendant's preference in dealing with the problem.

Although *Dinitz* might appear to limit the scope of a defendant's protection from reprosecution, the decision does no more than make explicit a limitation that always has been inherent in the Court's decisions safeguarding the "valued right to have [a] trial completed by a particular tribunal."[318] If error occurs in the course of a trial ending in conviction, the Court has held ever since *Ball* that the defendant may be reprosecuted upon reversal of the judgment.[319] Accordingly, although a defendant does have a right to an untainted trial, this right is ordinarily traceable to statutory or constitutional provisions other than the double jeopardy clause, and it has normally been assumed that the only practicable remedy for its violation is a new trial, not immunity from prosecution. The special interest protected by the double jeopardy clause is the defendant's interest in pursuing the first trial to completion when this course appears tactically advantageous, and this interest is protected fully by honoring the defendant's preference for mistrial when a difficulty arises. Indeed, as the Court recognized in *Dinitz*, an approach barring retrial under these circumstances would require rejection of the defendant's mistrial motion and would force completion of the trial, which would be followed presumably by conviction,[320] reversal based on the initial trial error, and reprosecution as allowed by *Ball*. This process would impose upon the defendant precisely the burden and expense against which the double jeopardy clause is supposed to provide protection. *Dinitz*, therefore, correctly suggested that the double jeopardy clause does not guarantee the right to a trial untainted by the actions of the judge or the prosecutor; rather, the clause protects only the defendant's right to participate in the decision whether to abort the trial once taint occurs.

Although the concept of consent to mistrial therefore appears sound, the same cannot be said about the ways in which lower courts have often applied it. The cases do recognize that

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[318] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[319] United States v. Ball, 163 U.S. 662 (1896); *see* text accompanying notes 28-30 *supra*.

[320] The defendant might, of course, be acquitted, but this is unlikely when the defense itself is pressing for mistrial.

retrial should be barred when the defendant's mistrial motion is triggered by prosecutorial misconduct that is intended to abort the proceedings[321] or is otherwise sufficiently egregious to require outright dismissal under due process standards,[322] but this limitation upon the consent doctrine is vague and has seldom been applied with vigor by the courts.[323]

Even more troubling has been the readiness of many courts to engraft upon the consent doctrine notions of tacit consent or constructive consent that expand the concept far beyond its justifiable limits. Courts have held that silence in the face of various trial difficulties constitutes "consent" to mistrial, even when little or no time was afforded for the defense to consider its options.[324] Numerous cases also have found implicit consent to mistrial simply because a defendant requested a long continuance,[325] sought to retain a new attorney,[326] or moved for a judgment of acquittal.[327] These decisions are wholly indefensible. In many of these situations, mistrial may not be the only appropriate means to implement the defendant's motion, and unless the defense has explicitly indicated a preference for the mistrial remedy, it cannot be said that "the defendant retains primary control over the course to be followed . . . ."[328] Mistrial may be proper, of course, regardless of the defendant's preference, but in that event it must be justified by double jeopardy standards such as those discussed in this Article and not by "consent."

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[321] Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967); *see* United States v. Dinitz, 96 S. Ct. 1075, 1081-82 (1976) (dictum); United States v. Jorn, 400 U.S. 470, 485 (1971) (dictum).

[322] United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976); Crim v. State, 294 N.E.2d 822 (Ind. Ct. App. 1973).

[323] *See, e.g.*, United States *ex rel.* Montgomery v. Brierley, 414 F.2d 552 (3d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970); Commonwealth v. Wright, 439 Pa. 198, 266 A.2d 651 (1970).

[324] United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975) (alternate holding); Holt v. State, 223 Ind. 217, 59 N.E.2d 563 (1945); Coppage v. State, 62 Okla. Crim. 325, 71 P.2d 509 (1937); *see* Annot., 63 A.L.R.2d 782, 793-95 (1959 & Supp. 1976). Decisions finding no consent under such circumstances, however, appear to be far more common. *E.g.*, Himmelfarb v. United States, 175 F.2d 924 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949); Curry v. Superior Court, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970); People v. Gardner, 37 Mich. App. 520, 195 N.W.2d 62 (1972); *see* Annot., 63 A.L.R.2d 782, 791-93 (1959 & Supp. 1976).

[325] State v. Veres, 7 Ariz. App. 117, 436 P.2d 629 (1968) (alternate holding), *cert. denied*, 393 U.S. 1014 (1969); People v. Ramirez, 27 Cal. App. 3d 660, 104 Cal. Rptr. 102 (1972); People v. Cabellero, 194 Misc. 145, 84 N.Y.S.2d 762 (1948).

[326] People v. Smith, 13 Cal. App. 3d 897, 91 Cal. Rptr. 786 (1970).

[327] Selman v. State, 406 P.2d 181 (Alas. 1965); State v. Arnold, 142 Kan. 589, 50 P.2d 1008 (1935); State v. Allesi, 216 N.W.2d 805 (N.D. 1974).

[328] United States v. Dinitz, 96 S. Ct. 1075, 1081 (1976).

Similarly, an affirmative motion for mistrial by the defendant[329] does not end the need for a critical examination of the underlying circumstances. Yet most courts fail to engage in such an inquiry. For example, when a defense motion for mistrial originally is denied, but mistrial is declared later in the trial, the courts generally hold that the consent to mistrial continues, even when intervening events may have made that course less favorable to the defendant.[330] Some decisions go a step further and hold that defense efforts to withdraw the mistrial motion are ineffective and that the "consent" thus continues despite explicit protestations to the contrary.[331] In all of these situations, the only course consonant with *Dinitz* is for the trial judge to take the few moments necessary to inquire whether the defense maintains its mistrial motion, and then to honor whatever preference the defense may express.

A defense motion for mistrial also should not constitute "consent" when it results from a trial judge's refusal to consider other solutions for the difficulties presented. In *United States v. Walden*,[332] two jurors had observed the defendants in handcuffs during a recess and possibly inferred that they were in custody. The judge rejected defense suggestions to probe the effect of the incident upon the two jurors, to seat the two alternate jurors, and to determine whether the other jurors had learned of the incident. Finally, counsel for some of the defendants moved for a mistrial. The denial of their double jeopardy pleas was upheld by an equally divided Fourth Circuit, sitting en banc.

The court should have found these facts sufficient to establish that the mistrial motion was "involuntary" for double jeopardy purposes. The "Hobson's choice" resulting from the

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[329] Courts usually hold that a mistrial motion by counsel is sufficient to establish waiver or consent to mistrial by the defendant. *See, e.g.*, People v. Strauss, 48 Misc. 2d 1006, 266 N.Y.S.2d 431 (1965); Commonwealth v. Wideman, 453 Pa. 119, 306 A.2d 894 (1973) (dictum); Annot., 63 A.L.R.2d 782, 790-91 (1959 & Supp. 1976). *Contra*, Jourdan v. State, 275 Md. 495, 341 A.2d 388 (1975). For a discussion of this issue, see generally Henry v. Mississippi, 379 U.S. 443, 451-52 (1965); Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966).

[330] *E.g.*, United States v. Goldstein, 479 F.2d 1061 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973); Kamen v. Gray, 169 Kan. 664, 220 P.2d 160 (1950). *Contra*, United States *ex rel.* Russo v. Superior Court, 483 F.2d 7 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973); Fugett v. State, 271 So. 2d 28 (Fla. 1972).

[331] *E.g.*, MacPherson v. State, 533 P.2d 1103 (Alas. 1975), *cert. denied*, 423 U.S. 871 (1975). *Contra*, Cardenas v. Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961); Gershon v. Sardonia, 50 Misc. 2d 423, 270 N.Y.S.2d 729 (Sup. Ct. 1966); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573, *cert. denied*, 423 U.S. 934 (1975).

[332] 458 F.2d 36 (4th Cir.) (en banc), *cert. denied*, 409 U.S. 867 (1972).

initial contamination of the jury did not itself invalidate the ultimate mistrial motion. Because the judge, however, had refused to consider reasonable alternatives to mistrial proposed by the defendants, they did not retain "primary control over the course to be followed . . . ."[333] Thus, the judge's error infringed upon the defendants' special interest in freely choosing whether to complete the first trial. The same would have been true in *Dinitz* if, after the judge's initial action excluding defense counsel, he had refused to allow a continuance or an interlocutory appeal and instead had left the defendant with no choice but to move for mistrial. Under these circumstances, the defendant's underlying double jeopardy rights would have been directly violated and no meaningful waiver could have been found.

In sum, the concept of consent is perfectly sound as long as it is confined to situations in which the defendant enjoys an unfettered choice whether to continue the proceedings and clearly expresses a preference not to do so. Mistrial may of course be proper in many other situations, but it must be justified by an evaluation of the competing considerations examined in this Article, and not by any artificial notion of consent.

IV. CONCLUSION

In *Illinois v. Somerville*, the Supreme Court relaxed the limitations upon retrial after mistrial. The Court's opinion, however, left unclear the status of earlier, more restrictive precedents and provided few guidelines by which the propriety of mistrial can be reliably determined at the time the decision must initially be made. The lower courts, far from refining and clarifying the applicable standards, have produced a mass of confusing and contradictory decisions. This state of the law is unsatisfactory because predictability is essential to provide defendants with reasonably certain safeguards against the burden of repeated trials and to prevent some defendants from winning unwarranted immunity from reprosecution.

An examination of the interests affected by mistrial decisions suggests that the result in *Somerville* was correct and that the relatively permissive approach toward retrial implicit in that decision should be followed in a wide range of situations. I have endeavored to identify these situations and to specify the characteristics of a flexible standard of "sound judicial administration"

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[333] United States v. Dinitz, 96 S. Ct. 1075, 1081 (1976).

that is suitable for application in such situations both by trial judges and by courts confronting double jeopardy claims subsequently. The standard of sound judicial administration does not, however, provide adequate protection for double jeopardy interests in a number of discrete situations. I have thus sought to identify these situations and to define the content of the more restrictive "strict necessity" standard that is appropriate for determining the propriety of mistrial in these situations.

The standard of sound judicial administration can do much to clarify and improve the administration of criminal justice in mistrial cases. This relatively flexible approach, however, should no longer be permitted to extend, as it often has since *Somerville*, into those areas in which the stringent limitations of earlier decisions remain an essential component of meaningful double jeopardy protection.